TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 127.

OGDEN CITY, APPELLANT,

vs.

JAMES C. ARMSTRONG, WILLIAM DRIVER, J. H. SPARGO, ET AL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED FEBRUARY 8, 1898.

(16,184.)

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1 & 2 In the District Court of the Fourth Judicial District of the Territory of Utah, Weber County.

J. C. ARMSTRONG, WM. DRIVER, J. H. Spargo, George W. Murphy, John Broom, W. M. Chapman, and H. L. Griffin, Plaintiffs,

vs.

OGDEN CITY, WM. H. TURNER, R. C. Lundy, John McManis, H. H. Spencer, M. N. Graves, Thomas D. Dee, H. W. Shurtliff, E. M. Allison, Jr., J. B. Elliott, F. J. Cannon, and James A. Calvert, Defendants.

Transcript of the Record on Appeal to the Supreme Court of Utah Territory.

3 The above-named plaintiffs complain of the above-named defendants and allege:

1. That the plaintiffs are residents and tax-payers in Ogden city, Weber county, Utah Territory, and bring this action concerning a matter of general interest to all tax-payers in said Ogden city, on their own behalf and on behalf of all others similarly situated.

2. That Wm. H. Turner, R. C. Lundy, John McManis, H. H. Spencer, M. N. Graves, Thomas D. Dee, H. W. Shurtliff, E. M. Allison, Jr., J. B. Elliott, F. J. Cannon, and James Calvert are, and at all times hereinafter mentioned were, the mayor and members of and constitute the common council of said Ogden city.

3. That said mayor and members of the common council of Ogden city, when acting in an organized capacity, did, on March 7th, 1892, pass a so-called resolution or ordinance creating three paving districts in said Ogden city; which so-called resolution or ordinance was in words and figures following, to wit:

"Finance committee recommending the immediate creation of three paving districts, as follows: District No. 1, Washington avenue from the south line of 23d street to the north line of 26th street; district No. 2, 25th street from the west line of Washington avenue to the west line of Wall avenue; district No. 3, 24th street from the east line of Washington to the east side of Adams; 25th street from the east side of Washington to the east side of Adams," Councillor Dee moved to lay on the table for one week. Motion lost. Councillor McManis moved to adopt. Motion carried.

Councillor Spencer moved the following motion, in pursuance of the proceedings already taken in ordering the creation of three paving districts: "I move that the council adopt the accompanying notice of intention, and that the same be published for 20 days, beginning with tomorrow morning, Tuesday, March 8th. Said notices were read and provided for paving districts Nos. 1, 2, and 3. Councillor Dee moved to lay on the table for one week. Motion lost, Dee and Elliott voting aye; Calvert, Cannon, Graves,

4 McManis, Shurtliff, and Spencer voting nay. The original motion was then put and carried, Calvert, Cannon, Graves, Mc-

Manis, Shurtliff, and Spencer voting aye; Dee and Elliott voting nay.

4. That in pursuance of the above so-called resolution or ordinance the following notice of intention was published on March 9th, 1892, in the Ogden Daily Standard, of Ogden city, in the words and figures following, to wit:

"Notice of intention of the city council of Ogden city of creating a district for paving and of paving and macadamizing the streets therein, and to defray the expense of such improvement by local assessment.

The city council of Ogden city, situate in Weber county, Territory of Utah, gives notice that it intends to make the following improvements, to wit:

Pave and macadamize the following streets: Twenty-fifth St., from the west line of Washington avenue to the west line of Wall avenue. This shall be known as paving district No. 2.

The boundaries of the district to be affected and benefited are lines running 150 feet back and parallel with the outer line of each side of the streets on each and every block and for the full length thereof therein.

The estimated cost of such improvement is $40,000.

For the payment of the cost and expenses thereof the city council intends to levy local taxes upon the real estate lying and being within said paving district to the extent of the benefits to such property by reason of such improvement.

The city council will on March 29th, 1892, hear objections in writing from any and all persons interested in said assessments.

By order of city council:

T. P. BRYAN,
City Recorder."

5. That on March 29th, 1892, at 9.55 o'clock a. m., D. H. Peery and sixty-eight others, who were owners of property within said paving district No. 2 and with frontage on 25th street, filed a petition with the city recorder of said Ogden city, protesting against the levying of any local assessment against or upon their property for the purpose of paving said 25th street, within said district; that a copy of such petition is hereto attached and marked Exhibit "A," and is made a part of this complaint.

6. That before action was taken upon said petition by said mayor and said city council Alice Forbes, Mrs. Fisher, and Patterson & Henley, owners of property in said paving district No. 2, with frontage on 25th street, filed petitions with the city recorder of said Ogden city, protesting against the levying of any local assessment against or upon their property for the purpose of paving said Twenty-fifth street, in said district; that the whole number of feet owned by these persons first protesting and other than the four last named, to wit, Alice Forbes, Mrs. Fisher, and Healy and Patterson, with frontage on 25th street, within said paving district No. 2, is about two thousand four hundred and fifty-five feet, which is more

than the one-half the whole frontage on said Twenty-fifth street, within said district, liable for assessment for local improvements.

6. That notwithstanding said protests of said abutting property-owners on said Twenty-fifth street, in said paving district No. 2, and without giving any other and further notice except as hereinbefore alleged, and without giving any such notice as is required by law for the hearing of complaints of abutting property-owners against said local improvements in said paving district No. 2, said mayor and members of the common council of Ogden city, when acting in an organized capacity, did, on April 4th, 1892, pass the following so-called resolution or ordinance, which is in words and figures following, to witness:

"Resolved, That the city council proceed as speedily as possible to the paving of the Twenty-fifth Street district with Utah sandstone blocks; that the city engineer be instructed to prepare the necessary specifications at once and submit the same at the next meeting of the council; that the competition of the said work be restricted to the *bona fide* residents of Ogden city, and that, so fas as possible, only Ogden labor be employed in the performance of the work.

7 Councillor Lundy moved to amend that the recorder give notice by publication to the property-owners in paving district No. 2 to file with the council before its meeting next Monday night their expressions as to the kind of paving desired by them.

Amendment lost and original motion carried."

8 7th. That on May 2nd, 1892, said mayor and said members of the said common council of said Ogden city, when acting in an organized capacity, did pass a so-called resolution or ordinance instructing the city recorder to advertise for bids for the paving of Twenty-fifth street, in said district No. 2; which notice is in the words and figures following, to wit:

"To paving contractors:

Bids will be received by the city recorder of Ogden city until 12 o'clock m., May 23rd, 1892, for paving 25th street, in Ogden city, from Washington to Wall avenue, according to the specifications of the city engineer of the city of Ogden, on file in the city recorder's office. Competition is restricted to *bona fide* residents of Ogden city. The city council reserves the right to reject any and all bids. Specifications will be furnished on application to the recorder.

By order of the city council:

T. P. BRYAN,
City Recorder."

8th. Plaintiffs further allege that they are and were at all times hereinbefore mentioned and hereafter mentioned the owners of real estate located in district No. 2, on 25th street; that J. C. Armstrong is the owner of the following-described real property, to wit: Beginning at the northwest corner of lot eight (8), in block —, and running south 330 feet, east 78 feet, north 330 feet, west 78 feet to the place of beginning; that H. L. Griffin is the owner of the following-described real property in plat "A" of Ogden City survey, to

wit: Beginning 70 feet east of the northwest corner of lot seven (7), block 19, thence west 132 feet, east 19.9 feet, north 132 feet, west 19.8 feet to the place of beginning; that William Driver is the owner of the following-described real estate in plat "A" of Ogden City survey, to wit: Beginning at the southeast corner of lot two (2), block 23, north 132 feet, thence west 50 feet, thence south 132 feet, thence east 50 feet to the place of beginning.

9 That William Chapman is the owner of the following-described real estate in plat "A" of Ogden City survey, to wit: Beginning 24.25 feet east of the southwest corner of lot one (1), block 23, north 132 feet, east 41 feet, thence south 132 feet, thence west 41 feet to the place of beginning.

10 That John Broom is the owner of the following-described real estate in plat "A" of Ogden City survey, to wit: Beginning at the southeast corner of lot one (1), block 25, thence west 159.75 feet, thence north 66 feet, thence west 5.25 feet, thence north 15 feet, thence east 80 feet, thence south 15 feet, thence east 85 feet, thence south 66 feet to the place of beginning.

That J. H. Spargo is the owner of the following-described real estate in plat "A" of Ogden City survey, to wit: Beginning 145 feet east of the southwest corner of lot two (2), block 25, thence east 40 feet, thence north 132 feet, thence west 20 feet, thence south 47 feet, thence west 20 feet, thence south 85 feet to the place of beginning.

That Geo. W. Murphy is the owner of the following-described real estate in plat "A" of Ogden City survey, to wit: Beginning 205 feet east of the southwest corner of lot 2, block 25, east 21½ feet, north 132 ft., thence west 21½ feet, thence south 132 feet to the place of beginning; also a part of lot 6, block 20, described as follows: Beginning at the northwest corner of lot 6, block 20, south 164.83 feet, east 132 feet, thence north 32.83 feet, east 25 feet, north 132 feet, west 107 feet to the place of beginning. All of the above-described property has a frontage on 25th street, in paving district No. 2, and which would be subject to tax for local improvements in common with the other abutting property-owners in said district; and the said plaintiffs further allege that they file this complaint on behalf of themselves and all other owners of real estate in said improvement district No. 2.

9th. And plaintiffs further allege that it is the intention of said mayor and common council to let a contract for the paving of said 25th street, in said district No. 2, according to the notice hereinbefore set out, and to levy a special tax for the paying of the expense of said paving contract upon plaintiffs' property, which is described above, and also upon the land of other abutting property-owners which may be liable for assessment in said district.

11 10th. That to pay the expense of said improvement the common council of Ogden city have under advisement an ordinance which provides for the paying of said expenses, and which has passed its first reading; which ordinance is hereto attached and made a part of this complaint and marked Exhibit "B."

12 And these plaintiffs are informed and believe, and upon such information and belief allege, that the said persons above named, who constitute the mayor and common council of Ogden city, claim and pretend that they have the right and authority to enter into a contract for the paving of said Twenty-fifth street, in said district No. 2, and to levy a special tax upon the abutting property liable for assessment in said paving district No. 2, and that they intend and will, acting as such mayor and common council, unless restrained by the order and decree of this court, enter into such contract for paving and levying such assessment upon said abutting property, which assessment will become a lien upon plaintiffs' property and upon all the abutting property of Twenty-fifth street, in said paving district No. 2, which contract and which levy of assessment will cast a cloud upon the title of all said real estate.

12th. That the proposed action of the said mayor and members of the common council of said Ogden city is entirely without authority and beyond their jurisdiction.

13th. That the notice of intention to create paving district No. 2, and which was published in the Ogden Daily Standard on March 9th, 1892, and which has heretofore been fully set out, does not conform to the statute in this, to wit: "That it is uncertain and indefinite, in that it does not state whether it is the intention to pave or macadamise said district, and if to pave, the kind of material to be used; that the whole of the lands to be affected by said local assessment is not sufficiently described; that it provides for the hearing only of written objections; that the cost could not be properly estimated without designating the kind of material intended to be used."

13 14th. And these plaintiffs are informed and believe, and upon such information and belief allege, that before said notice of intention to pave was published no plans or specifications had been prepared; that no particular kind or character of pavement had been adopted or figured upon; that no estimate had been made by the city engineer of said Ogden city or by any of the defendants or officers of said Ogden city, and that the statement in said notice was of a gross sum, without any reference to the actual or any estimate of the cost.

15th. And plaintiffs further allege that there are many different kinds of paving, such as asphalt paving, wooden-block pav-

14 ing, cobblestone paving, granite-block paving, and stone paving and macadam, and that the cost of laying said different kinds of paving in place vary from one dollar to four dollars per square yard.

16th. That many other real-estate owners in said paving dist. No. 2 would have signed the protest against improving said 25th street, in said district No. 2, if they had not been informed and understood from certain members of the common council of said Ogden city that before the material to be used in said district would be decided upon that it would be left to the choice of a majority of the real-estate owners in said district, or else said district would be

macadamized, and if it had not been for these representations and also on account of the indefiniteness of the said notice, that many others who did not sign the protest against paving would have signed the same.

17th. And these plaintiffs further allege that in the city of Salt Lake and Denver and throughout the Western country there are many people engaged as contractors in making contracts for putting down all kinds of paving at the least possible cost to abutting property-owners; that if the bidding for the contract for the paving of Utah sandstone blocks on Twenty-fifth street, in said paving district No. 2, was open, free and unrestricted, and not limited to *bona fide* residents of Ogden city, these plaintiffs believe and allege that the city of Ogden could make a much more favorable contract for the doing of said work and with less expense to these plaintiffs and to all of the real-estate owners in said district No. 2 on whose behalf this complaint is filed.

18th. That in Ogden city there is only one firm or corporation engaged in putting down of sandstone-block pavement, and that all competition will necessarily be restricted to this one firm, which is no competition at all.

15 19th. And these plaintiffs further allege that they have no plain, speedy, and adequate remedy at law, and that unless this honorable court shall interfere by an order and decree of this court restraining said defendants that said defendants will levy a tax upon plaintiffs, and upon all the property of other real-estate owners similarly situated, which is illegal and void and will cast a cloud upon all of the real estate, and that the defendants, unless restrained by order and decree of this court, will enter into a

16 contract for the doing of the work above set out, which, if illegal and void, will engender a multiplicity of suits upon Ogden city and upon these plaintiffs and all others similar situated; that great and irreparable injury will result to these plaintiffs and to all others similarly situated if said assessments are made and said contract for paving entered into by said defendants.

Wherefore plaintiffs pray that the defendants, their agents, servants, attorneys, councellors, and employés, and each of them be perpetually enjoined and restrained from levying assessments upon plaintiffs' real estate and upon all other real-estate owners similarly situated for the purpose of paving said Twenty-fifth street, in said dist. No. 2, and from creating any cloud upon plaintiffs' real estate and all other real-estate owners similarly situated, and also from entering into any contract for the paving of said Twenty-fifth street, in said dist. No. 2, and also from taking any other or further proceedings under the so-called resolutions or ordinances in this complaint set forth, and also for a temporary injunction during the pendency of these proceedings, and that the final decree of this court declare that the notice of intention to pave Twenty-fifth street to be insufficient and illegal and void as not complying with the statute, and for such other and further relief as may be agreeable to equity.

H. H. HENDERSON &
BROWN & HENDERSON,
Attorneys for Plaintiff.

Duly verified.
Filed May 21st, 1892.

C. H. McCLURE, *Clerk*,
By L. B. BEST, *Deputy*.

17 EXHIBIT "A."

To the common council of Ogden city.

GENTLEMEN: We, the undersigned, property-owners on Twenty-fifth street between west line of Wall avenue and the west line of Washington avenue, and which is designated as paving district No. 2, hereby protest against the levying of any local assessment against or upon our property for the purpose of paving said street within said district, and we represent to your honorable body that we are owners in plat "A" of Ogden city of the following property, to wit:

Name.	Frontage of 25th St.	Block.
D. H. Peery	28 feet	25
S. C. & W. J. Stephens	65 feet	24
D. M. Stephens	35 feet	24
S. C. Stephens	21	24
J. C. Stephens	82 feet	19
John Pincock	22 feet	19
D. H. Stephens	32 feet	24
Rebecca W. McKee	75 feet	23
Caleb L. McKee	25 feet	19
Chas. Reed & C. Fitzgerald	45.75 feet	23
R. A. Wells	40 feet	25
J. H. Spargo	40 feet	25
John Broom	165 feet	25
Joseph Morely	30 feet	25
Lamoni Grix	20.75 feet	25
C. F. Krauch	30.33 feet	24
G. W. Lashus	50 feet	20
18 Mrs. Butterworth & J. M. Major	52 feet	20
M. Biel	25.50 feet	20
Charles Fuchs	25 feet	19
Geo. W. Murphy	21.50 feet	25
Geo. W. Murphy	107 feet	20
James Thompson	13.50 feet	25
James L. Dee	31 ft. & 4.5 in.	25
Mor-is Livingston	19 feet	25
J. E. and Ann Horrocks	125 feet	25
W. Kay	22 feet	25
Clark and Patterson	50 feet	23
Mrs. H. A. Lewis	25 feet	23
Quorum of Seventies, per B. H. Goddard	40 feet	19
Scudder & Carlson	22 feet	20
J. H. Cardon	47 feet	23
J. C. Armstrong	79 feet	20

C. F. Taylor, by O. E. Hill, ag't	92 feet		24
Emma Munns	30 feet		24
John Maguire	22.50 feet		25
Boyle & Patterson	25 feet		24
H. G. Lewis	34.50 feet		24
J. H. Watkins	21 feet		25
Wm. Chapman	41 feet		23
Mrs. M. E. Fitzgerald	25 feet		20
C. Sorenson	17 feet		25
Nicholas estate—(Geo. M. Kerr, guardian), John Goomer, Jane Rose Leslie, Nichols " " "	132 feet		24
19 Job Pingree	29.50		20
N. J. Warner	54 feet		19
Mrs. Libbie Wadman	40.50 feet		19
J. A. Morrison	25 feet		20
H. L. Griffin	19.8 feet		
D. H. Peery, Jr.	20 feet		25
Wm. Driver	50 feet		
Reality Co., D. H. Peery, Jr., ag't	62 feet		24
E. & H. Madden, by L. R. Rogers, att	25 feet		23
David Evans			
L. R. Rogers	62 feet		23
D. H. Peery			
L. P. Birchfield, by D. H. Peery, Jr., ag't.	50 feet		23

Filed March 28th, 1892, at 9.55 a. m.

20 EXHIBIT "B."

An ordinance creating paving district No. 2 and levying and assessing a special tax upon the abutting property in said district to pay the cost of paving therein.

Whereas, the city council has heretofore ordered to be published in the Standard, a daily newspaper printed and published in Ogden city, for the full period of 20 days, the following notice of intention:

Notice of intention of the city council of Ogden city of creating a district for paving and paving and macadamizing the streets therein and to defray the expenses of such improvement by local assessment.

The city council of Ogden city, situate in the county of Weber, Territory of Utah, gives notice that it intends to make the following improvements, to wit, pave and macadamize the following streets: Twenty-fifth street from the west line of Washington Ave. to the west line of Wall avenue. This shall be known as paving district No. 2.

The boundaries of the district to be affected and benefited are lines running 150 feet back and parallel with the outer lines of each side of the streets on each and every block and for the full length thereof therein. The estimated cost of such improvement is $40,000. For the payment of the costs and expenses thereof the city council intends to levy local taxes upon the real estate lying and being within said paving district to the extent of the benefits to such property by reason of such improvement. The city council will on March 29th, 1892, at 10 o'clock a. m., hear objections in writing from any and all persons interested in said local assessments.

By order of the city council:

T. P. BRYAN,
City Recorder.

21 And whereas the said notice of intention was published daily continuously in said paper from March 9th, 1892, until March 31st, 1892, and whereas in said paving district No. 2 there has not been filed written objections to the improvement mentioned, signed by the owners of one-half the front feet on said Twenty-fifth street, from the west line of Washington avenue to the west line of Wall avenue:

22 Now, therefore, be it ordained by the city council of Ogden city as follows:

SEC. 1. That for the purpose of paving 25th street from the west line of Washington Ave. to the west line of Wall avenue, be and the same is hereby constituted a paving district and the same shall be known as paving district No. 2 of Ogden city.

SEC. 2. That said 25th street be paved from the west line of Washington Ave. to the west line of Wall avenue with red sandstone blocks. That said pavement shall be laid and constructed under the supervision of the city engineer, and shall be done under contract to be let to the city by the lowest bidder for such work.

SEC. 3. That the costs of making such improvements of laying said pavement, except the intersection of streets and spaces opposite alleys within said district, shall be assessed upon the lots and lands abutting upon said 25th street, in proportion to the front foot abutting upon 25th street.

SEC. 4. A special tax of $10.50 per front foot upon the property abutting on said 25th street from the west line of Washington Ave. to the west line of Wall Ave., is hereby levied for the purpose of laying and making said improvement as hereinbefore provided for and said tax shall become delinquent as follows: One-tenth shall become delinquent fifty days after the passage of this ordinance; one-tenth in one year; one-tenth in two years; one-tenth in three years; one-tenth in four years; one-tenth in five years and one-tenth in six years; one tenth in seven years; and one-tenth in eight years; after the passage of this ordinance, and each installment, except the first shall draw interest at the rate of seven per cent. per annum from and after the passage of this ordinance until the same shall become delinquent, and after the same shall become delinquent interest at the rate of 10% shall be paid thereon, and

such tax shall be collected and enforced as any other cases of special taxes.

SEC. 5. That the Ogden City Street Railway Company, a corporation heretofore created and now operating an electric street railway in said paving district on said 25th street from the west line of Washington avenue to the west line of Wall Ave., be required and directed to pave all the space between its rails and tracks on
23 said Twenty-fifth street, and a space of two feet wide outside of the rails on each side of the outside track and also the space between the rails on all side tracks and two feet on the outer side of the said side tracks at the same time as the paving is done on the other parts of the street; and the pavement to be laid and made by the said street railway company shall be of the same material as the other paving upon said street. That after said pavement is laid said railway company is required and directed to keep that portion of the street which it is required to pave in good and proper repair, using for said purpose the same material that the said street is or shall be paved with, and shall keep the said pavement level with the top rails of the track of its railway.

SEC. 6. That —— ——, —— ——, —— ——, —— ——, members of the city council be and are hereby appointed a board of equalization and review of the taxes levied under this ordinance, and upon the completion of the list or lists of the property in said paving district No. 2, to be taxed, the said list or lists shall be placed in the hands of the board and the said board shall give public notice of the completion of the said list or lists and appoint not less than five consecutive days upon which they will meet during the usual business hours, stating in said notice the place of its meetings, and during the time specified shall keep the list or lists open to public inspection, and any person or persons feeling themselves aggrieved shall have a hearing before said board and the said board are hereby granted power and authority to make correction of any tax deemed by them unequal and unjust.

24 *Answer.*

Come now the defendants, by their attorney, R. H. Whipple, and for answer to the complaint herein say—

That they deny each and every allegation therein contained, except such as are hereinafter expressly admitted.

1. Defendants admit that the plaintiffs were at the date of the filing of the complaint herein residents and tax-payers in Ogden city, Utah.

2. Defendants admit that W. H. Turner, R. C. Lundy, John McManis, H. H. Spencer, N. M. Graves, Thomas D. Dee, H. W. Shurtliff, E. M. Allison, Jr., F. R. Elliott, F. J. Cannon, and James A. Calvert were at the date of the filing of said complaint the mayor and members of and constitute the common council of Ogden city.

3. Admit that said mayor and members of the said common council, when acting in an organized capacity, did, on or about

March 7th, 1892, pass an ordinance creating three paving districts in said Ogden city, which resolution or ordinance was substantially as set out in paragraph 3 of the complaint.

4. Defendant admits that in pursuance of such resolutions or ordinance a notice of intention was published, substantially as alleged in paragraph four of the complaint, in the Ogden Daily Standard of Ogden city, beginning on March 9th, 1892, and says the same was published for twenty full days thereafter in said paper.

5. The defendant denies that on March 29th, 1892, or on any other date, or at all, or at 9.55 o'clock of that day, or at any other hour or at all, D. H. Peery and sixty-eight others or any one, who were owners of property within said paving district No. 2 and with frontage on 25th street, filed a petition with the city recorder of said Ogden city protesting against the levying of any local assessment against or upon their property for the paving of 25th street within said district, and denies that a copy of such petition or any petition is atached to the complaint herein, and denies that said Exhibit "A" is a copy of said petition or of any petition.

Denies that before action was taken upon said petition by the mayor and the said city council Alice Forbes, Mrs. Fisher, and
25 Patterson & Healey, owners of property in said paving district No. 2, with frontage on 25th St., filed a petition with the city recorder of said Ogden city protesting against the levying of any local assessment against or upon their property for the purpose of paying said 25th street in said district.

Denies that the whole number of feet owned by those first protesting, as alleged, and other then the four last named, to wit, Alice Forbes, Mrs. Fisher, and Healey & Patterson, or any other person or persons with or owning frontage on 25th street, within said paving district No. 2, is about 2,455 feet, and denies that any one protested or that the parties so named protested represented or owned more or owned equal to one-half of the whole frontage on 25th street within said district liable for assessment for local improvements, and denies that the persons named in paragraph five in this complaint or any person or persons for them or either of them or any owner or owners of frontage on said 25th St. ever at any time protested against the levy of a local assessment upon any of said frontage for the purpose of paying for such improvement, and the defendant says that if any such persons ever did on the 29th day of March, 1892, or at any date or at all file petition with the city recorder of said Ogden city protesting against the levying of any local assessment against or upon their property for the purpose of paving 25th street within said district, a large number of persons so protesting and owning frontage on said street and in said district before or upon said date last named, and before the city council had acted upon the proposition, withdraw their several protests, and that upon that time, date, and hour that the said city council met to hear objections in writing from any and all persons interested in said local assessment there were not protests in writing before the city council made by owners of frontage on street in said district

representing one-half of the frontage in feet in said district and upon said St.

6. Denies that notwithstanding protest of said abutting property-owners on said 25th street, in said paving district No. 2, and without giving any other or further notice, except as hereinbefore alleged in the complaint, and without giving such notice as is required by law for the hearing of the complaints of abutting property-owners against said local improvements in said paving district No.
26 2, said mayor and members of the city council of Ogden city, when acting in an organized capacity, did, on April 4th, 1892, pass the so-called resolution or ordinance as in paragraph 6 of the complaint set out, and allege- that if said city council did pass any such resolution as set out in paragraph 6 of the complaint said resolution had nothing to do with the paving of said 25th street and said district; and, further, alleges that said city council had, prior to the passing of the said resolution, passed upon the question of its jurisdiction, and had decided that persons ow-ing one-half of the frontage in feet in said dst. No. 2 on said street had not filed protests in writing with the city recorder, as required by law, protesting against the levying of any local assessment against or upon their property for the purpose of paving said 25th street, in said district, and said council had so decided and had made their decision a matter of record.

7th. Admits that the mayor and members of said common council, when acting in an organized capacity, did pass a resolution instructing the city recorder to advertise for bids for the paving of 25th street, in said district No. 2, and that a notice was published, substantially as set out in paragraph 2 of the complaint, but denies that any bids were received or accepted by said city council at said time, or that any contract was made for paving said district or street under or by virtue of any bid received on account of the publication of said notice.

8th. Defendant denies that the plaintiffs were at all times before the complaint herein was filed or that they are now the owners of real estate located in said district No. 2, on said 25th street, and denies that J. C. Armstrong was and is the owner of real property described as follows, to wit:

Beginning at the northwest corner of lot eight (8), block —, and running south 330 feet, east 78 feet, north 330 feet, west 78 feet to the place of beginning.

Denies that H. L. Griffen is the owner of the following-described real estate in plat "A," Ogden City survey, to wit:

Beginning 70 feet east of the northwest corner of said lot 7, block 19, west 132 feet, east 19.8 feet, north 132 feet, west 19.8 ft. to place of beginning.

27 And denies that William Driver is the owner of the following-described real estate in plat "A," Ogden City survey, to wit: Beginning at the southeast corner of lot 2, block 23, north 132 feet, west 50 feet, south 132 feet, east 50 feet to place of beginning.

Denies that William Chapman is the owner of the following-de-

scribed real estate in plat "A," Ogden City survey, to wit: Beginning 43.25 feet east of the southwest corner of lot 1 (1), block twenty-three (23), north 132 feet, east 41 feet, south 132 feet, west 41 feet to the place of beginning.

Denies that John Broom is the owner of the following-described real estate in plat "A," Ogden City survey, to wit; Beginning at the southwest corner of lot 1, block 25, thence west 159.75, thence north 66 feet, west 5.25 feet, north 15 feet, east 85 feet, south 66 feet to the place of beginning.

Denies that J. H. Spargo is the owner of the following-described real estate in Ogden City survey, to wit: Beginning 145 feet east of the southwest corner of lot 2, block 25, east 40 feet, north 132 feet, west 20 feet, south 47 feet, west 20 feet, south 85 feet to the place of beginning.

Denies that Geo. W. Murphy is the owner of the following-described real estate in Ogden City survey, to wit: Beginning 205 feet east of the southwest corner of lot 2, block 25, thence east 21.5 feet, north 132 feet, west 21.5, south 132 feet to place of beginning; also a part of lot 6, beginning at the northwest corner of said lot 6, block 20, thence south 164.83 feet, east 132 feet, north 32.83 feet, east 25 feet, north 132 feet, west 107 to place of beginning; and denies that all of the above-described property has frontage of 25th street, in paving district No. 2.

9th. Defendants deny that it is or was the intention of said mayor and said common council, at the date of the filing the complaint herein, or that it is now the intention of said mayor and common council, to let a contract for paving of said 25th street, in said district No. 2, according to the notice in the complaint set out, or that it is their intention to levy a special tax for the paying of the expence of said paving contract upon plaintiffs' property above described or upon the land of other abutting property-owners which may be liable for assessment in said district.

10th. Denies that to pay the expenses of said improvement
28 that the common council of Ogden city have under advisement an ordinance which provides for the paying of said expenses, and denies that any such ordinance is attached to the complaint and made a part thereof.

11th. Denies that the persons named as defendants herein now constitute the mayor and common council of said Ogden city, and deny that they claim and pretend that they have the right and authority to enter into a contract for the paving of said 25th street, in district No. 2, and to levy a special tax upon the abutting property liable for assessment in said paving district No. 2, and deny that they intend to and will, acting as such mayor and common council, unless restrained by an order and decree of this court, enter into such contract for paving and levying such assessments upon said abutting property.

12th. Deny that said mayor and members of the said common council of Ogden city *was* entirely without authority to levy such assessment at the date of the filing of this complaint.

13th. Denies that the notice of intention to create paving district

No. 2 and which was published in the Ogden Daily Standard on March, 1892, and which was set out in the complaint, does not comform to the statute; denies that it is uncertain and indefinite, in that it does not state whether it is the intention to pave or macadamize said district or in the kind of material to be used; denies that it is indefinite and uncertain in any manner, and says that the same sufficiently complies with the statute in such cases made and provided.

14th. Defendant denies that before the said notice of intention to pave was published that no plans or specifications were published, and denies that no particular kind or character of pavement had been adopted; denies that no estimate had been made by the city engineer, and denies that the statement in said notice was a gross sum, without any reference to actual or estimated cost.

15th. Denies that many other real-estate owners in said paving district No. 2 would have signed protests against improving 25th street if they had not been informed by certain members of the common council of said Ogden city that before any material to be used in said district would be decided upon that it would be left to the choice of the majority of the real-estate owners in said district or else said district would be macadamized, and denies that
29 on account of such misrepresentations and on account of the indefiniteness of said notice many others would have signed petitions against paving said district.

16th. Defendant denies that if the bidding for the contract for the laying of Utah sandstone blocks on 25th street, in said paving district No. 2, was free and unrestricted to *bona fide* residents of Ogden city, that the said Ogden city should have made or can make a much more favorable contract for the doing of said work and with less expense to the plaintiffs and to all other real-estate owners in said district.

17th. Denies that there is or was only one firm in Ogden city engaged in the business of putting down sandstone-block pavement, and denies that all competition was or is necessarily restricted to this one firm.

18th. Defendant denies that the plaintiffs have no plain, speedy, and adequate remedy at law, and denies that unless the court shall interfer- by an order and decree restraining defendants that said defendants will levy a tax upon plaintiffs' property and upon all of the property of real-estate owners similarly situated, and denies that if such levy is made it will be illegal and void, and denies that it will cast a cloud upon all of the said real estate, and denies that unless restrained by and order and decree of this court that they will enter into a contract for the doing of the work above set out, and denies that the plaintiffs will suffer irreparable injury if said assessments are made and said contract entered into.

Wherefore this defendant prays that this case and action be dismissed and defendants have their costs herein.

R. H. WHIPPLE,
Att'y for Def'ts.

Duly verified.

Filed April 6th, 1894.

K. S. BOREMAN, *Clerk*,
By L. B. BEST, *Deputy*.

30 *Supplemental Complaint.*

Plaintiffs, by leave of court first had and obtained, file this their supplemental complaint and allege—

That heretofore, to wit, on the 21st day of May, 1892, the plaintiffs, J. C. Armstrong *et al.*, filed their complaint in the clerk's office of the said district court against the defendants therein named, which complaint is still on file in the office of the clerk of said court and is hereby referred to for greater certainty as to its allegations and is made a part of this supplemental complaint.

That in the complaint the plaintiffs therein, among other things, prayed that the defendants, their agents, servants, attorneys, councellors, and employés, and each of them, be perpetually enjoined & restrained from *and each of them be perpetually enjoined and restrained from* assessing or levying assessments upon plaintiffs' real estate described in said complaint or upon any other real estate situate in the alleged paving district No. 2, mentioned in said original complaint, and to restrain said defendants or any of them from entering into a contract for paving that part of Twenty-fifth street in said alleged district contained, and to restrain defendants and each of them from taking any further or any other proceedings under the proceedings in said complaint set forth, and for a final decree declaring the proceedings of defendants to pave as proposed in said proceedings as illegal, invalid, and void, and for such other and further relief as to equity appertains.

The plaintiffs further allege that the defendants above named filed a demurrer to said original complaint, which was sustained by the said district court; that an appeal was taken from the judgment entered upon said order sustaining said demurrer to the supreme court of the Utah Territory; that said order and judgment was reversed by said supreme court, and said cause was remanded and remitted to said district court with orders to overrule the demurrer.

The plaintiffs further alleged in their original complaint that they brought their actions concerning a matter of general interest to all tax-payers in said Ogden city and on their own behalf and on behalf of all other persons similarly situated; that the questions involved in the action were of general interest, and the reasons hereinafter mentioned have a common interest with the plain-
31 tiffs to the original complaint; and, said persons hereinbelow mentioned having elected to come into said action as plaintiffs, the said plaintiffs mentioned in the original complaint hereby ask that the persons hereinbelow mentioned may, together with the plaintiffs in the original complaint, be the plaintiffs in this supplemental complaint and in this action.

That the following-named persons respect*fully*, Mathias Biel, who is the owner, and was at the date of the proceedings complained of,

of a part of lots 8 and 9, block 20, plat "A," Ogden City survey, described as follows: Beginning at the northeast corner of said lot 8, running thence east 28 feet, thence south 10 rods, thence west 52.5 feet, thence north 10 rods, thence east 24.5 feet to the place of beginning; also Joseph Clark, who is and was at the date of the proceedings hereinafter complained of the owner of the following-described real estate, to wit, an undivided one-third of part of lot 6, block 20, plat "A," Ogden City survey, beginning 179 feet east of the northwest corner of said lot 6, running thence south 132 feet, thence west 25 feet, thence north 132 feet, thence east 25 feet to the place of beginning; also the owner of a part of lot 1, block 23, plat "A," Ogden City survey, beginning 142.75 feet west of the southeast corner of said lot 1, thence running west 40 feet, thence north 8 rods, thence east 40 feet, thence south 8 rods to the place of beginning; also an undivided one-half of part of lot 2, block 23, plat "A," Ogden City survey, beginning 75 feet west of the southeast corner of said lot 2 and running thence north 120 feet, thence west 50 feet, thence south 120 feet, thence east 50 feet to the place of beginning; also Geo. W. Lashus, who is and was at the date of the proceedings complained of the owner of the following-described real estate, to wit, a part of lot 10, block 20, plat "A," Ogden City survey, beginning 66 feet west on the northeast
32 corner of said lot 10, running thence west 50 feet, thence south 9 rods, thence east 50 feet, thence north 9 rods to the place of beginning; also Lamoni Grix, who is and was at the date of the proceedings complained of the owner of the following-described real estate, to wit, a part of lot 1, block 25, plat "A," Ogden City survey, beginning 100 feet 7.5 inches east of the southwest corner of said lot 1, running thence east 20 feet 9 inches, thence north 6 rods, thence west 20 feet 9 inches, thence south 6 rods to the place of beginning; also Carl Sorensen, who is and was at the date of the proceedings complained of the owner of the following-described real estate, to wit, a part of lot 1, block 25, plat "A," Ogden City survey, beginning 24 feet 9 inches east of the southwest corner of said lot 1, running thence east 17 feet, thence north 6 rods, thence west 17 feet, thence south 6 rods to the place of beginning; also J. E. Horrocks and Ann Horrocks, who are and were at the date of the proceedings hereinafter complained of the owners of the following-described real estate, to wit, part of lot 2, block 25, plat "A," Ogden City survey, beginning at the southwest corner of said lot 2, running thence east 65 feet, thence north 120 feet, thence west 65 feet, thence south 120 feet to the place of beginning; also J. S. Lewis, who is and was at the date of the proceedings hereinafter complained of the owner of the following-described real estate, to wit, a part of lot 1, block 24, plat "A," Ogden City survey, beginning at the southeast corner of said lot 1, running thence north 155 feet, thence west 100 feet, thence south 55 feet, thence east 31 feet, thence south 100 feet, thence east 69 feet to the place of beginning; also Lindsey R. Rogers, who is and was at the date of the proceedings complained of the owner of the following-described real estate, to wit, a part of lot 1, block 23, plat "A," Ogden City survey, be-

ginning 18 inches east of the southwest corner of said lot 1,
33 running thence east 26.6 feet, thence north 132 feet, thence west 26.6 feet, south 132 feet to the place of beginning; also beginning 68.1 feet east of the southwest corner of said lot and block and running thence east 35.15 feet, thence north 132 feet, thence west 35.15 feet, thence south 132 feet to the place of beginning; also Patrick Healey, who is and was at the date of the proceedings complained of the owner of the following-described real estate, to wit, an undivided one-half of a part of lot 2, block 23, plat "A," of Ogden City survey, beginning 125 feet west of the southeast corner of said lot 2 and running north 120 feet, thence west 25 feet, thence south 120 feet, thence east 25 feet to the place of beginning; also Joseph Morely, who is and was at the date of the proceedings complained of the owner of the following-described real estate, to wit, a part of lot 1, block 25, plat "A," Ogden City survey, beginning 159 feet 9 inches west of the southeast corner of said lot 1, running thence west 30 feet, thence north 99 feet, thence east 24 feet 9 inches, thence south 33 feet, thence east 5 feet 3 inches, thence south 99 feet to the place of beginning; also Zilpha J. Stephens, who is and was at the date of the proceedings complained of the owner of the following-described real estate, to wit, part of lot 7, block 19, plat "A," Ogden City survey, beginning at 10 rods east of the northwest corner of said lot 7 and running thence west 60 feet, thence south 8 rods, thence east 60 feet, thence north 8 rods to the place of beginning; also W. C. Warren, who is and was at the date of the proceedings complained of the owner of the following-described real estate, to wit, a part of lot 4, block 24, plat "A," Ogden City survey, beginning at the southwest corner of said lot 4 and running thence west 40 feet, thence north 157 feet, thence east 40 feet, thence south 157 feet to the place of beginning; also Almira C. Baker, who is and was at the date of the proceedings hereinafter complained of the owner of a part of lot 2, block 24, plat "A," Ogden City survey, beginning 2 rods west of
34 the southeast corner of said lot 2, running thence west 21.25 feet, thence north 20 rods, thence east 21.25 feet, thence south 20 rods to the place of beginning; also D. H. Stephens, who is and was at the date of the proceedings complained of the owner of a part of lot 2, block 24, plat "A," Ogden City survey, beginning at the southeast corner of said lot 2 and running thence west 2 rods, thence north 20 rods, thence east 2 rods, thence south 20 rods to the place of beginning; also D. M. Stephens, who is and was at the date of the proceedings complained the owner of a part of lot 2, block 24, plat "A," Ogden City survey, beginning 42.5 feet east of the southwest corner of said lot 2 and running thence east 14 feet, thence north 20 rods, thence west 14 feet, thence south 20 rods to the place of beginning; also Mary A. Stephens, who is and was at the date of the proceedings complained of the owner of a part of lot 2, block 24, plat "A," Ogden City survey, beginning 21.75 feet east of the southwest corner of said lot 2 and running thence east 20.75 feet, thence north 20 rods, thence west 21.75 feet, thence south 20 rods less 40 feet, thence east 6 inches, thence south 40 feet to the place of

beginning; also Elizabeth Stephens, who is and was at the date of the proceedings complained of the owner of the following described real estate, to wit, a part of lot 7, block 19, plat "A," Ogden City survey, beginning 225 feet west of the northeast corner of said lot 7 and running thence west 19.80 feet, thence south 8 rods, thence east 19.80 feet, thence north 8 rods to the place of beginning; also J. O. Stephens, who is and was at the date of the proceedings complained of the owner of a part of lot 1, block 24, plat "A," Ogden City survey, beginning 69 feet west of the southeast corner of said lot 1, running thence west 65 feet, thence north 155 feet, thence east 34 feet, thence south 55 feet, thence east 31 feet, thence south
35 100 feet to the place of beginning; also the Ogden Union Railway and Depot Company, a corporation, which is and was at the date of the proceedings complained of a corporation and the owner of a part of lots 1 and 8, block 2, Ogden five-acre plat "A," Ogden City survey, beginning at the northeast corner of said lot 1 and running thence north 3 rods, thence west 5 chains, thence south 6 rods, thence east 5 chains, thence north 3 rods to the place of beginning, and all of lot 5, block 24, plat "A," Ogden City survey, owned by W. A. Kerr.

D. H. Peery, Jr., the Realty Co. of Kittery, Maine, a corporation; Job Pingree, Carrie Lewis, and Geo. W. Murphy are and were at the date of the proceedings complained of the owners of real estate in said Ogden city, on said 25th street, within said paving district, and subject to said special assessment, which real estate is fully described by the proof made and plats shown in evidence in this case.

And the said plaintiffs further allege that the said city and said defendants, after the commencement of this action, to wit, on the 22d day of March, 1893, passed the ordinance attached to said complaint and marked "Ex. A," which is hereto attached *to* and a part of this supplemental complaint, which ordinance these plaintiffs allege is and was invalid, and that *said* defendants, in pursuance of said invalid ordinance and unauthorized and invalid proceedings of said city, its officers and agents, were about to expose the real estate described in the original and this supplemental complaint to sale to satisfy the illegal assessment aforesaid, and threatened to continue to sell the said real estate annually for ten years as each installment of said tax becomes due.

That said plaintiffs and each and all of said plaintiffs pro-
36 tested against the sale of their property and the creation of a cloud upon their respective titles, but that *said* city of Ogden and its officers and agents, with the defendants, insisted upon said sale, and that said plaintiffs and each and all of them were by said defendants compelled to pay the amounts hereinafter alleged as having been paid to prevent the sale of their said property and prevent a cloud upon their respective titles, to wit: That said J. C. Armstrong was compelled to pay the said city of Ogden the sum of $95.04; Mathias Biel, $63.00; Joseph Clark, $18.00; Samuel Chapman, for the estate of William Chapman, $19.20; Joseph Clark, for Clark, Emmett and Thompson, $30.00; William Driver, $60.00;

H. L. Griffin, $23.76; Lamoni Grix, $24.90; Ann Horrocks, $62.40; James E. Horrocks, $62.40; Geo. W. Lashus, $60.00; H. D. & J. S. Lewis, $82.08; Carrie Lewis, $30.00; Joseph Morely, $36.00; Patrick Healey, for Patterson & Healey, $3.00; Joseph Clark, for Patterson & Clark, $60.00; L. R. Rogers, $74.04; J. H. Spargo, $48.00; W. H. Stephens, $14.70; Carl Sorenson, $20.40; W. C. Warren, $48.00, and the Nicholas estate, $160.00, by Geo. W. Kerr, administrator of said estate; D. H. Perry, Jr., $24.00; Realty Co. of Kittery, Maine, a corporation, $748.80; Job Pingree, $35.40; Geo. W. Murphy, $154.20, and Ogden Union Depot and Railway Co., a corporation, $118.80.

That the real estate belonging to the other plaintiffs than these just hereinbefore named were sold by said Ogden city to satisfy the said illegal assessment.

That inasmuch as plaintiffs and each of them are without any speedy and adequate remedy at law for the wrongs in the action alleged, the plaintiffs ask, as they have prayed in the said original complaint and in this supplemental complaint, that said defendants and each of them may be required by this court to make true, specific, and full answer to all and singular the allegations aforesaid, and that this court will decree that said ordinance and said proceedings thereunder be null and void and of no effect, and in order that the plaintiffs may have justice they further pray that an account be taken of the amounts paid by them respectively to said Ogden city, its officers, and agents, and that said Ogden city and the other defendants, as they shall appear to be liable, may be decreed to pay to the respective parties such amounts as it shall appear they are entitled to, and that the sales of real estate heretofore made may be set aside and annulled, and that the court will grant to said plaintiffs and each of them such further relief as shall appear to be just and as to equity appertains.

37

EVANS & ROGERS AND
ZANE & ZANE.

Duly verified.

Filed April 9th, 1894.

K. S. BOREMAN, *Clerk.*

38 *Answer to Supplemental Complaint.*

Come now the defendants, and for answer to the supplemental complaint herein filed say—

That they deny each and every allegation therein contained except such as are hereinafter expressly admitted.

1st. Defendants deny that the plaintiffs in their original complaint brought their action concerning a matter of general interest to all tax-payers in Ogden city, and deny that said action was brought on behalf of other persons similarly situated as *was* the plaintiffs, and deny that the questions involved in the action were of general interest, and especially deny that the persons hereafter

mentioned and mentioned in the supplemental complaint have a common interest with the plaintiffs in the original complaint.

2. Defendants deny that the following-named persons respectively own real estate in district No. 2, mentioned in said original complaint, to wit:

Deny that Mathias Biel is the owner, and was the owner at the time of the proceedings complained of, of a part of lots eight (8) and nine (9), in block two (2), plat "A," Ogden City survey, described as follows, or any land or at all: Beginning at the northeast corner of said lot 8, running thence east 28 feet, thence south ten rods, thence west 52.5 feet, thence north 10 rods, thence east 24.5 to the place of beginning.

Also deny that Joseph Clark is the owner, and was the owner *to* the date of the proceedings complained of, of an undivided one-third of part of lot 6, block 20, plat "A," Ogden City survey, beginning 179 feet east of the northwest corner of said lot 6, running thence south 132 feet, thence west 25 feet, thence north 132 feet, thence east 25 feet to the place of beginning.

39 Also a part of lot 1, block 23, plat "A," Ogden City survey, beginning 143.75 feet west of the southeast corner of said lot 1 and running thence west 40 feet, thence north 8 rods, thence east 40 feet, thence south 8 rods to the place of beginning.

Also an undivided one-half of a part of lot 2, block 23, plat "A," Ogden City survey, beginning 75 feet west of the southeast corner of said lot 2 and running thence north 120 feet, thence east 50 feet, thence south 120 feet, thence east 50 feet to the place of beginning, or that he was the owner of any land in said block or street.

5. Also deny that Geo. W. Lashus is the owner, and was the owner at the date of the proceedings complained of, of a part of lot 10, block 20, plat "A," Ogden City survey, beginning 66 feet west of the northeast corner of said lot 10 and running thence west 50 feet, thence south 9 rods, thence east 50 feet, thence north 9 rods to the place of beginning, or any land.

6. Denies that Lamoni Grix is the owner, and was the owner at the date of the proceedings complained of, of a part of lot 1, block 25, plat "A," Ogden City survey, beginning 100 feet 71.5 inches east of the southwest corner of said lot 1 and running thence east 20 feet 9 inches, thence north 6 rods, thence west 20 feet 9 inches, thence south 6 rods to the place of beginning, or any land.

7. Also deny that J. E. Horrocks is the owner, and was the owner at the date of the proceedings complained of, of a part of lot 2, block 25, plat "A," Ogden City survey, beginning at the southwest corner of said lot 2 and running thence east 65 feet, thence north 120 feet, thence west 65 feet, thence south 120 feet to the place of beginning.

40 8. Also denies that Carl Sorenson is the owner, and was the owner at the date of the proceedings complained of, of a part of lot 1, block 25, plat "A," Ogden City survey, beginning 24 feet 9 inches east of the southwest corner of said lot 1, running thence east 17 feet, thence north 6 rods, thence west 17 feet, thence south 6 rods to the place of beginning.

Also deny that J. S. Lewis is the owner, and was the owner at the date of the proceedings complained of, of a part of lot 1, block 24, plat "A," Ogden City survey, beginning at the southeast corner of said lot 1, running thence north 155 feet, thence west 100 feet, thence south 55 feet, thence east 31 feet, thence south 100 feet, thence east 69 feet to the place of beginning, or any land.

9. Also denies that Lindsey R. Rogers is the owner, and was the owner at the date of the proceedings complained of, of a part of lot 1, block 23, plat "A," Ogden City survey, beginning 18 inches east of the southwest corner of said lot 1, running thence east 26.6 feet, thence north 132 feet, thence west 26.6 feet, thence south 132 feet to the place of beginning; also beginning 68.1 feet east of the southwest corner of said lot and block and running thence east 35.15 feet, thence north 132 feet, thence west 35.15 feet, thence south 132 feet to the place of beginning, or any land.

10. Also deny that Patrick Healey is the owner, and was the owner at the date of the proceedings complained of, of an undivided one-half of a part of lot 2, block 23, plat "A," Ogden City survey, beginning 125 feet west of the southeast corner of said lot 2 and running thence north 120 feet, thence west 25 feet, thence south 120 feet, thence west 25 feet to the place of beginning, or any land.

11. Also denies that Joseph Morely is the owner, and was the owner at the date of the proceedings complained of, of a part
41 of lot 1, block 25, plat "A," Ogden City survey, beginning 159 feet 9 inches west of the southeast corner of said lot 1, running thence west 30 feet, thence north 99 feet, thence east 24 feet 9 inches, thence south 33 feet, thence east 5 feet and 3 inches, thence south 66 feet to the place of beginning, or any land.

12. Also denies that Zilpha J. Stephens is the owner of, and was the owner of at the date of the proceedings complained of, of a part of lot 4, block 24, plat "A," Ogden City survey, beginning 10 rods east of the northwest corner of said lot 7, running thence west 60 feet, thence south 8 rods, thence east 60 feet, thence north 8 rods to the place of beginning, or any land.

13. Also deny W. C. Warren is the owner, and was the owner at the date of the proceedings complained of, of a part of lot 4, block 24, plat "A," Ogden City survey, beginning at the southwest corner of said lot 4 and running thence west 40 feet, thence north 157 feet, thence east 40 feet, thence south 157 feet to the place of beginning, or any land.

14. Also deny that Almira C. Baker is the owner, and was the owner at the date of the proceedings complained of, of a part of lot 2, block 24, plat "A," Ogden City survey, beginning 2 rods west of the southeast corner of said lot 2 and running thence west 21.5 feet, thence north 20 rods, thence east 21.5 feet, thence south 20 rods to the place of beginning, or any land.

15. Also deny that D. H. Stephens is the owner, and was the owner at the date of the proceedings complained of, of a part of lot 2, block 24, plat "A," Ogden City survey, beginning at the southeast corner of said lot 2 and running thence west 2 rods, thence north

20 rods, thence east 2 rods, thence south 20 rods to the place of beginning, or any land.

42 16. Also deny that D. M. Stephens is the owner, and was the owner at the date of the proceedings complained of, of a part of lot 2, block 24, plat "A," Ogden City survey, beginning 42.5 feet east of the southwest corner of said lot 2 and running thence east 14 feet, thence north 20 rods, thence east 14 feet, thence south 20 rods to the place of beginning, or any land.

17. Also deny that Mary A. Stephens is the owner, and was the owner at the date of the proceedings complained of, of a part of lot 2, block 24, plat "A," Ogden City survey, beginning 21.75 feet east of the southwest corner of said lot 2 and running thence east 21.75 feet, thence north 20 rods, thence west 21.5 feet, thence south 20 rods less 40 feet, thence east 6 inches, thence south 40 feet to the place of beginning, or any land.

18. Also deny that Elizabeth Stephens is the owner, and was the owner at the date of the proceedings complained of, of a part of lot 7, block 19, plat "A," Ogden City survey, beginning 2225 feet west of the northwest corner of said lot 7 and running thence west 19.80 feet, thence south 8 rods, thence east 19.80 feet, thence north 8 rods to the place of beginning, or any land.

19. Also deny that J. O. Stephens is the owner, and was the owner at the date of the proceedings complained of, of a part of lot 1, block 24, plat "A," Ogden City survey, beginning 69 feet west of the southwest corner of said lot, running thence west 65 feet, thence north 155 feet, thence east 34 feet, thence south 55 feet, thence east 31 feet, thence south 100 feet to the place of beginning, or any land.

20. Also deny that the Ogden Union Railway and Depot Company is the owner, and was the owner at the date of the proceedings complained of, of a part of lots 1 and 8, block 2, Ogden five-acre plat "A," Ogden City survey, beginning at the northeast corner of said lot 1 and running thence north 3 rods, thence west 5

43 chains, thence south 6 rods, thence east 5 chains, thence north 3 rods to the place of beginning; and all of lot 5, block 24, plat "A," Ogden City survey, owned by W. Kerr, or any land.

21. Defendants admit that after the commencement of the original action that the city of Ogden, through its mayor and council, passed an ordinance on March 22d, 1893, which is substantially the same as Exhibit "A," attached to the said supplemental complaint, but these defendants especially deny that said ordinance is and was invalid and den*ies* that the officers and agents of Ogden city were about to expose the real estate described in the original and in the supplemental complaint to satisfy the illegal assessments mentioned in same.

22. The defendants specifically deny that the plaintiffs and each and all of them or any of them protested against the sale of their property and against the creation of a cloud upon their respective titles.

23. And denies that the plaintiffs and each and all of them were by these defendants compelled to pay the amounts as alleged in the

supplemental complaint as having been paid to prevent the sale of their property and to prevent a cloud upon their respective titles, to wit, denies that J. C. Armstrong was compelled to pay to said city of Ogden the sum of $95.04 or any amount or at all; Mathias Biel, $63.00 or any amount or at all; Joseph Clark, $48.00 or any amount or at all; William Chapman, $49.20 or any amount or at all; Clark, Emmett & Thompson, $30 or any amount or at all; William Driver, $50 or any amount or at all; H. L. Griffin, $23.70 or any amount or at all; Lamoni Grix, $24.90 or any amount or at all; Ann Horrocks, $54.60 or any amount or at all; Geo. W. Lashus, $60 or any amount or at all; James E. Horrocks, $54.60 or any amount or at all; H. D. & J. S. Lewis, $82.08 or any amount
44 or at all; Carrie Lewis, $30 or any amount or at all; Joseph Morely, $36 or any amount or at all; Patterson & Healey, $30 or any amount or at all; Patterson & Clark, $60 or any amount or at all; L. R. Rogers, $74.04 or any amount or at all; J. H. Spargo, $48 or any amount or at all; W. H. Stephens, $14.70 or any amount or at all; Carl Sorenson, $20.40 or any amount or at all; W. C. Warren, $48 or any amount or at all; Nichols estate, $160.08 or any amount or at all; and if any or all of such payments were made the same were made voluntarily and are and were voluntar*ily* payments.

Defendants deny that the plaintiffs and each of them are without any speedy and adequate remedy at law for the alleged wrongs in the complaint alleged, but allege and say that the plaintiffs and each of them have a plain, complete, and adequate remedy at law under and by virtue of the statutes of this Territory.

23½. That the plaintiffs named in the supplemental complaint had full knowledge before and at the time that the said pavement was being constructed, and that the assessment complained of was being and had been made, and that the contract complained of was and had been let, and that the city, defendant herein, was about to and was expending large amounts of money in constructing said pavements in said district as aforesaid, and took legal steps to stop the said work or to question the proceedings of the city council until this supplemental complaint was filed in this court, several months after the work was accepted by the said city council as being complete and after the said city had fully paid for said work. Having thus stood by and in silence as to the levying of said assessment, the construction of the said work and the acceptance of the same, and the city having fully paid for it, the said plaintiffs cannot now overthrow the proceedings of the said city council and thus escape payment of the said local tax assessed against their
45 property, and so this defendant says that the said plaintiffs in this supplemental complaint are estopped to complain in this action as alleged in said supplemental complaint.

24. And for further answer and for defense to said supplemental complaint say that said pretended supplemental complaint does not state facts sufficient to constitute a supplemental complaint, and does not state anything additional or amendatory to the original complaint of J. C. Armstrong *et al. vs.* Ogden City *et al.*, filed

herein May 22, 1892, and that the said pretended supplemental complaint does not state any matter consistent with nor in aid of such original complaint, but states or attempts to state a new cause or causes of action, and asks other and different relief and attempts to change the nature and object of the original complaint, and that said supplemental complaint brings in other and different parties, plaintiffs, whose rights, if any they have, are different from those of the original plaintiffs at date of filing the original complaint or now, and who are and were not interested parties by the allegations of the original complaint.

And for further answering and for defense to said supplemental complaint these defendants say that the cause of action of the plaintiffs and each and every cause of action of each and every one of the said plaintiffs is barred by the provisions of section one (1), chapter forty-one (41), of the laws passed by the 29th session of the Legislative Assembly of the Territory of Utah, approved March 13th, 1890.

And for further answering and for defense to said supplemental complaint says that there is a misjoinder of parties plaintiff in this: that in truth and in fact each one of said plaintiffs is
46 a separate and independent person, and their action or cause of action, if any they have, is to each, separate and independent, requiring of this court the rendering of a separate and independent judgment for the amount claimed by each and every one of said plaintiffs.

That each of said plaintiffs is suing the defendant on a demand for money, the amount being specifically stated, and that each and every one of such claims and demands is for a different amount.

And for further answering and for defense to said supplemental complaint says that there is a misjoinder of causes of action in said supplemental complaint in this: that the said supplemental complaint contains causes of action which are not separately stated and cannot properly be united, and that they are mingled and combined in the same allegation; in other words, said supplemental complaint sets forth but one cause of action, when, in reality, it embraces numerous causes of action, as follows:

A cause of action in favor of J. C. Armstrong against defendants for the sum of $95.04, a cause of action in favor of Mathias Biel against defendants for the sum of $63, a cause of action in favor of Joseph Clark against defendants for the sum of $48, a cause of action in favor of William Chapman against defendants for the sum of $49.20, a cause of action in favor of Clark, Emmett and Thompson against defendants for the sum of $30, a cause of action in favor of William Driver against defendants for the sum of $60, a cause of action in favor of H. L. Griffin against defendants for the sum of $23.76, a cause of action in favor of Lamoni Grix against defendants for the sum of $24.90, a cause of action in favor of Ann Horrocks against defendants for the sum of $54.60, a cause of action in favor of James E. Horrocks against defendants for the sum
47 of $54.60, a cause of action in favor of Geo. W. Lashus against defendants for the sum of $60, a cause of action in favor of H.

D. & J. S. Lewis against defendants for the sum of $82.08, a cause of action in favor of Carrie Lewis against defendants for the sum of $30, a cause of action in favor of Joseph Morely against defendants for the sum of $36, a cause of action in favor of Patterson & Clark against defendants for the sum of $60, a cause of action in favor of Patterson & Healey against defendants for the sum of $30, a cause of action in favor of L. R. Rogers against defendants for the sum of $74.04, a cause of action in favor of J. H. Spargo against defendants for the sum of $48, a cause of action in favor of W. H. Stephens against defendants for the sum of $14.70, a cause of action in favor of Carl Sorenson against the defendants for the sum of $20.40, a cause of action in favor of W. C. Warren against defendants for the sum of $48, a cause of action in favor of the Nichols estate against defendants for the sum of $160.08, and that each of said causes of action is not separately stated or set out in a separate clause or count in said complaint, and that said several causes of action as therein alleged do not effect all the plaintiffs therein alike, and that no one of said plaintiffs is in any way interested in the claim sued upon by any one of the other plaintiffs, but that the demand of each plaintiff, as well as the relief sought by him, is separate and independent to himself; and that such several causes of action, if any cause of action said plaintiffs or any one of them have, do not affect all the parties to the action and are not claims or demands or causes of action against all the defendants.

Wherefore the defendants demand that this case be dismissed and *and* that they have their judgment for costs.

R. H. WHIPPLE,
Attorney for Defendants.

Duly verified.

48 Filed May 26th, 1894.

K. S. BOREMAN, *Clerk*,
By L. B. BEST, *Deputy*.

In the Fourth Judicial District Court of Utah Territory, County of Weber.

J. C. ARMSTRONG *et al.*, Plaintiffs,
vs.
OGDEN CITY *et al.*, Defendants.

This cause came on regularly for trial before the Hon. Wm. H. King, presiding judge of the fourth judicial district court of Utah Territory, county of Weber, sitting without a jury, on the 29th day of September, 1894, at p. m., Messrs. Evans & Rogers and C. S. Zane and John M. Zane appearing as attorneys for the plaintiffs, and Mr. R. H. Whipple appearing as attorney for the defendants; whereupon the following proceedings were had:

Mr. Whipple asked and was granted permission to amend his answer by interlining the words "Or another amount or at all" after the denials of the specific amounts in his answer.

Mr. JOHN ZANE: If your honor please, the first evidence we have to offer is the record of the regular meeting Feb. 29th, 1892, of the city council of Ogden, which reads as follows:

"Councillor Cannon moved that the city attorney be instructed to prepare a notice of the city's intention to pave Washington avenue from 22d to 27th streets, 24th from Washington to
49 Wall, 25 from Washington to Wall, Grant avenue from 24th to 25th, said notice to be in accordance with the land and to be presented to the council next Monday night. Motion carried."

The next regular meeting, March 7th, 1892, the finance committee reported recommending the immediate creation of three paving districts, as follows: District No. 1, Washington avenue from the south line of 23d street to the north line of 26th; district No. 2, Twenty-fifth street from the west line of Washington avenue to the west line of Wall avenue; district No. 3, Twenty-fifth street from the east side of Washington avenue to the east side of Adams avenue, and Twenty-fourth street from the east side of Washington avenue to the east side of Adams avenue.

Councillor Dee moved to lay on the table for one week. Motion was lost. Councillor McManis moved to adopt. Motion carried.

Mr. WHIPPLE: I object to the record unless it is all introduced.

COURT: You can introduce such part as you wish when you come to it.

"Notice of intention.—Councillor Spencer made the following motion: In pursuance of the proceedings already taken in ordering the creation of three paving districts, I move that the council adopt the accompanying notices on intention, and that the same be published for twenty days, beginning with tomorrow morning, Tuesday, March 8th. Said notices were read and provided for paving districts Nos. 1, 2, and 3. Councillor Dee moved to lay on the table for one week. Motion lost, Dee and Elliott voting 'aye' and Calvert, Cannon, Graves, McManis, Shurtliff, and Spencer voting 'nay.'

50 Notice of intention No. 2 of the city council of Ogden city of creating a district for paving and of paving and macadamizing the streets therein and to defray the expense of such improvement by local assessment.

The city council of Ogden city, situate in the county of Weber, Territory of Utah, gives notice that it intends to make the following improvements, to wit, pave and macad-mize the following streets: Twenty-fifth street from the west line of Washington avenue to the west line of Wall avenue. This shall be known as paving district N-. two. The boundaries of the district to be effected and benefitted are lines running 150 feet back and parallel with the outer lines of each side of the streets on each and every block and for the full length thereof therein. The estimated cost of such improvement is $40,000. For the payment of the costs and expenses thereof, the city council intends to levy local taxes upon the real estate lying and being within said paving district to the extent of the benefits

to such property by reason of such improvement. The city council will, on March 29th, 1892, at 10 a. m., hear objections in writing from any and all persons interested in said local assessments."

(That was March 7th.)

MARCH 29TH, 1892.

Special meeting to hear objections to paving in districts Nos. 1, 2, and 3.

Council met at ten o'clock a. m. No quorum being present, adjournment was taken until 2 o'clock p. m.

At 2 o'clock p. m., March 29th, 1892, council met as per adjournment. The following members were present at roll-call: Councillors Cannon, Calvert, Elliott, McManis, and Spencer.

The recorder was instructed to receive any and all documents relating to the paving question, and to note upon the same
51 the time filed, and present to the council, together with the documents now on file, at their next meeting. Councillor Cannon moved that we postpone further *on* consideration of this question until next Monday morning at 10 o'clock, and that the council do now adjourn until that hour and day.

Special meeting, April 4th, 1892.

Council met at 10 o'clock as per adjournment. The following members were present at roll-call: Councillors Cannon, Dee, Elliott, Graves, Lundy, McManis, and Spencer.

All protests against levying a local tax in districts No. 1, 2, and 3 were read. Councillor Cannon moved that further action be deferred until 3.30 p. m., and that Councillor Elliott be appointed a committee of one to compute by the records the number of feet protesting against the levying of a tax in the aforementioned districts and report the result to the council at the adjourned meeting today. Motion carried. Councillor Elliott moved that Mr. Cannon be appointed a committee of one to consult with the city attorney as to the legality of receiving papers filed since the 29th of March. Motion carried. On motion of Councillor Graves, council adjourned until 3.30 p. m. Council met at 3.30 p. m.

We offer in evidence the special report made by Mr. Elliott, the special committee to whom was referred the protest in paving districts Nos. 1, 2, and 3. This is a special report.

OGDEN, UTAH, *April 4th*, 1892.

To the mayor and city council of Ogden city, Utah:

In the matter of protests referred to me this day against the levying of a local tax for the purpose of paving in districts Nos. 1, 2, and 3, I submit the following report after having carefully compared said protests with the records as follows:

(Omitting district No. 1) district No. 2, total number of feet protesting, 2,315; withdrawals from the same filed March 29th,
52 1892, 432.33 feet; net number of feet protesting, 1,878.66 feet; total number of feet in district, 3,960 feet; number of feet in

favor of, 2,081.33; whole number of feet over those protesting, 202.66 feet.

Respectfully submitted.

J. R. ELLIOTT,
Special Committee.

On motion (going back to the record of the council)—on motion of Councillor Graves, the report was accepted and placed on file. On motion of Councillor Cannon, council adjourned at 4.15 p. m.

Regular meeting, April 11th, 1892.

Councillor Spencer moved the adoption of the following resolution:

Resolved, That the city proceed as speedily as possible to the paving of 25th Street district with Utah sandstone blocks; that the city engineer be instructed to prepare the necessary specifications at once, and submit the same at the next meeting of the council; that the competition for said work be restricted to *bona fide* residents of Ogden, and that so far as possible only Ogden labor be employed in the performance of the work. Councillor Lundy moved to amend that the recorder give notice by publication to the property-owners in paving district No. 2 to file with the council, before its meeting next Monday night, their expressions as to the kind of paving desired by them. Motion was lost, Dee, Elliott, Lundy voting "aye;" Calvert, Cannon, Graves, Shurtliff, and Spencer voting "nay." Councillor Lundy moved that the word "sand" be stricken from the resolution. Motion was lost. Original motion was then put and carried by a unanimous vote. Councillor Dee moved
53 that the city attorney be instructed to officially notify the street railway companies of the city's intention on paving in district No. 2. Motion carried.

Mr. ZANE: If your honor please, as to this special report that we offered in evidence, there was only a part of it which my associates think that we should have offered, and that is the single part referring to the total number of feet protesting, 2,315, and if they want to introduce the report for the purpose of showing the number of feet withdrawn they can do so.

Mr. WHIPPLE: We object to having anything withdrawn from the record after having gone in.

COURT: I think that they can be permitted, and when it comes to your portion of the case, if you desire to offer it all you can do so.

Mr. ZANE: Our evidence will show that I excluded the number of feet withdrawn. We do not want to be understood as vouching for the correctness of that report.

Mr. Whipple took an exception to the ruling.

Next—

Regular meeting, April 25th, 1892.

The city engineer reported that in conformity with the instructions of the council of the 11th inst. he submitted specifications for the paving of 25th street from Washington to Wall avenue with

stone blocks, and, inasmuch as the specifications had not been canvassed by the committee on paving, recommended that they be referred to said committee for revision.

Councillor Cannon moved that Councillors Calvert and Shurtliff be added to the paving committee, and that the specifications of the city engineer be referred to said committee to report to the next meeting of the council. Councillor Dee moved to amend that the specifications be referred to be acted upon as a committee of the whole. Motion carried. The original motion as amended
54 was then put and carried.

Councillor Dee moved that the action of the council by which it was decided to pave 25th street with sandstone blocks be reconsidered. Motion carried.

Now, the next special meeting, April 27th: The specifications submitted by the city engineer for the paving of district No. 2 with sandstone blocks were read. Councillor Cannon moved that the committee recommend the adoption of the specifications, provided the council decide to pave said district with Utah sandstone blocks, and that it arise and make such a recommendation to the council through the recorder. Motion carried.

Upon the council resuming session the recorder reported as per the instructions of the committee of the whole after a lengthy discussion *pro* and *con.* upon the adoption of Councillor Spencer's resolution of the 11th inst. relative to the paving.

Council adjourned at 11.25 p. m.

Regular meeting, May 2nd, 1892.

Councillor Cannon moved the adoption of the following resolution:

Resolved, That the city recorder be instructed to advertise for twenty days for bids for paving the 25th Street district according to specifications of City Engineer Parmley, the competition for the contract to be restricted to *bona fide* residents of Ogden city and the city to reserve the right to reject any and all bids.

At the request of Councillor Dee the specifications were read "that tar and sand would be used between the blocks" or "sand" only.

Councillor Cannon arose to a point of order, claiming precedence for the previous question. The chair ruled the motion of Councillor Elliott in order. Councillor Cannon appealed from
55 the decision of the chair. The appeal was sustained by a vote of the council. Councillor Dee moved to amend that three inches of concrete be laid as a base. No second. The original motion was then put and carried.

Regular meeting, May 29th, 1892.

Councillor Cannon moved that the city attorney be instructed to prepare and submit at the next meeting of the council a paving ordinance for paving district No. 2. Motion carried.

Councillor Cannon moved that the report of the committee of the

whole recommending the adoption of the specifications of the city engineer for paving district No. 2 be adopted. Motion carried.

Councillor Cannon moved that the city engineer prepare specifications relative to the payments to be made paving contractors and submit same to the council at the next meeting. Motion carried.

Regular meeting, May 16th, 1892.

The city engineer reported an ordinance creating paving district No. 2 and levying and assessing a special tax on the abutting property in said district to pay the costs of paving therein, which, on motion of Councillor Cannon, passed its first reading and was referred to the special paving committee.

Regular meeting, June 27th, 1892.

The city engineer reported, stating that in view of the proposed paving of 25th street it would be necessary to change the grade of the center line of said street, and recommended that the center grade be changed as near as possible to a grade $\frac{2}{10}$ foot lower than the present grade of the curb-line, and asked that the matter be referred to the proper committee for investigation. On motion of Councillor Cannon, referred to the paving committee.

56 Councillor Cannon moved the adoption of the following resolutions:

Resolved, That the city engineer be instructed to prepare, under the direction of the paving committee, and report at next meeting specifications for paving of 25th Street district as follows: From each curb outward for 12 feet with Utah red sandstone; balance of street with asphaltum. Motion carried.

Regular meeting, July 5th, 1892.

The city engineer reported specifications for the paving of 25th street with stone and asphaltum. Referred to committee on paving.

Regular meeting, July 11th, 1892.

Councillor Shurtliff moved the adoption of the following resolution:

Resolved, That the city attorney be instructed to prepare and present at the next meeting of the council an ordinance levying a local assessment to pay the costs of paving in the 25th Street district; also an ordinance providing for the issuance of $50,000 of 5% paving bonds to cover costs in said district. On motion of Councillor Spencer, this portion of the resolution was adopted:

That is, the report of special ordinance levying a local assessment.

Regular meeting, July 18th, 1892.

The special committee on paving reported upon the report of the city engineer of June 27th, 1892, wherein he recommended that the grade of the center line of 25th street be changed as near as possi-

ble to a grade $\frac{2}{10}$ feet lower than the present grade of the curb-line, recommending that said report be adopted. On motion of Councillor Spencer, the report was adopted.

The city attorney reported ordinance for levying a tax for paving in paving district No. 2. The ordinance reported by the city attorney, creating paving district No. 2 and levying and assessing a special tax on the abutting property in said district to pay the
57 costs of paving therein, was taken up. On motion of Councillor Cannon, it passed its first reading and was referred to the paving committee.

Regular meeting, August 1st, 1892.

Councillor Calvery moved the adoption of the following resolution:

Resolved, That the committee on paving, in any advertisements which they may issue for bids to pave 25th street, prescribe the following conditions: Bids from *bona fide* residents of Ogden city only will be considered, and every bidder must accompany his proposal by a guaranty that he will employ only Ogden labor, so far as possible, in said paving and in the preparation of material therefor.

Mr. WHIPPLE: The defendant objects to the introduction of that part of the record which confines the bids for doing the work complained of in this case to *bona fide* residents of Ogden city because the same is immaterial under the laws of this Territory.

COURT: I do not think it is very material; it is merely historical; it may go in subject to your exception.

Regular meeting, August 15th, 1892.

The special committee on paving reported upon the specifications furnished by the city engineer for the paving of 25th street with sandstone-block edging and asphaltum center, recommending the adoption of the same.

AUG. 22ND, 1892.

Ordinance Creating Paving District No. 2.

The ordinance creating paving district No. 2 was taken up and, on motion of Councillor Cannon, laid on the table for one week.

AUG. 29TH, 1892.

The ordinance creating paving district No. 2 and levying and assessing a special tax on the abutting property in said dis-
58 trict to pay the costs of paving therein was taken fr-m the table and, on motion of Councillor Spencer, passed its second reading and was referred to the city attorney to report at the next regular meeting.

MARCH 22ND, 1893.

The city attorney reported the ordinance creating paving district No. 2 and levying and assessing a special tax on the abutting property in said district to pay the cost of paving therein, which was

referred to him Aug. 29th, 1892, after having passed its second reading. On motion of Councillor Warren, the ordinance was read by sections.

After two or three small amendments, Councillor Jones moved that the ordinance be read by its title and do pass. Motion carried, all members present voting "aye."

On motion of Councillor Maguire, the recorder was authorized to have the ordinance published in the Standard when approved by the mayor.

Councillor Jones moved the adoption of the following resolution: Resolved, That the city recorder be instructed to advertise for twenty days in the Ogden Daily Standard, commencing March 23rd, 1893, for sealed proposals for bids for paving the 25th Street district according to the specifications of the city engineer now on file in the office of the city recorder, where they can be seen by bidders, the competition for the contract to be restricted to *bona fide* residents of Ogden city. The city reserves the right to reject any and all bids.

Mr. WHIPPLE: The defendant now moves to strike out the portion of the motion of Mr. Jones which confines the bids to *bona fide* residents of Ogden city, as the same is immaterial under the
59 statute.

Motion overruled and exception taken.

Mr. ZANE: On motion of Councillor Warren, the resolution was laid on the table until the next meeting of the council.

Now, on April 23rd, 1893—

Councillor Jones moved the adoption of the following resolution: Resolved, That the city recorder be instructed to advertise for twenty days, commencing April 5th, 1893, for paving the 25th Street district according to the specifications of the city engineer now on file in the city recorder's office, where they can be seen by bidders, the competition for the contract to be restricted to *bona fide* residents of Ogden city, and the city to reserve the right to reject any and all bids. Resolution adopted by a unanimous vote.

Mr. WHIPPLE: The defendant moves to strike out the last portion which confines bidders to *bona fide* residents of Ogden city for the reason that the same is immaterial.

COURT: Well, it may be understood that this all goes in under your objection, and you may take an exception.

JULY 3RD, 1893.

A communication from the auditor was read, giving notice that the assessment plat of paving district No. 2 is completed, and giving further notice which I do not care about unless you want it.

Mr. ZANE to Mr. Whipple: I suppose you will admit that these resolutions that I have been reading from the minutes were not submitted to the mayor for his approval by him?

Mr. WHIPPLE: No; I will not admit it.

Mr. ZANE: Now, if your honor please, we desire to offer in evidence the ordinance. I will read this. (Same being a printed copy

of said ordinance, and it being conceded by defendant's
60 counsel that the same is a copy.) Said ordinance was marked Exhibit "A."

Now, if your honor please, we desire to offer in evidence the specifications and contract for paving. They are the original copies from the city recorder's office. We desire to introduce this contract and specifications and have it marked "Plaintiffs' Ex. B."

Mr. WHIPPLE: The defendant now objects to the introduction of Plaintiffs' Ex. B. for the reason that the same is immaterial.

COURT: Objection overruled.

Mr. ZANE: Now, if your honor please, we desire to offer in evidence the original plat of this assessment of the district.

COURT: Let it be understood that the copy, when offered here, may be substituted for the original.

Mr. ZANE: We desire to offer in evidence the assessment-sheet, second paving district, Ogden, Utah.

COURT: Does that purport to show the names of the property-owners?

Ans. Yes, sir; the names of the owners.

COURT: Abutting on the street?

Mr. ZANE: Yes, sir.

Mr. ZANE: And the succeeding sheet—assessment-sheet, second paving district, Ogden, Utah—these two sheets, the original of the first in the book—simply for the purpose of showing the location of these blocks and this paving district.

Mr. WHIPPLE: The defendant objects to the offer for the reason that it is not shown that this map was in existence at the time that the parties complaining should have protested against the assessment of this tax.

Second. It does not show that it is the original plat examined by the council and by the committee on paving. Third.
61 That it is immaterial for any purpose in this case.

COURT: As to the latter objection, the court does not think that should be overruled; the second one, that it is not an original one.

Mr. ZANE: We offer it for a double purpose. Our first purpose in offering it here is to show that it is a map made by the city where they put down the location of the streets and the places where this assessment is levied.

COURT: Do you concede that it is a plat of the city and is in the city recorder's office and is the basis upon which they levied this tax or upon which they collected it?

Mr. WHIPPLE: No, sir; I will not admit that it is the basis upon which they made the assessment, nor will I admit that it was considered in any way by the city at the time that these passed upon the sufficiency of the protests.

COURT: Do you concede that this is a correct representation of paving district No. 2 as evidenced by the city records?

Mr. WHIP-LE: It is at the time, I think, your honor; but it is not at the time that this protest should have been filed.

Mr. ZANE: Will you admit that it is a city record?

Mr. WHIPPLE: I will admit that it is a city record.

Mr. ZANE: We offer it, then, as an admission by the city.

COURT: It will be received, of course, if it does not pertain to that time and is so shown; it will not be material. It may be received and give defendant an exception.

Mr. ZANE: This case may be shortened and simplified a great deal on this point. We offer this for the purpose of showing, not only the situation of the property, but for the purpose of showing the admission by the city of the ownership in these various parties whose names they have put down here. Now, of
62 course, if we have to go on and prove the ownership of the property in all of them, it will make a long thing of it.

Mr. WHIPPLE: It would not be material if that was true. The fact is these parties must show that they are the owners of the land at the date of the protesting. It is not shown that this map was ever in existence at the time or represents the true owners at the time.

COURT: I do not know but that presumption of continuity would prevail in this case. Having shown ownership, the presumption is that a man continues to be the owner.

Mr. WHIPPLE: It is denied in the pleadings that he is the owner.

Mr. ZANE: In order to supplement this we will call the witnesses to show who was in possession and owned this property at that time.

JOSEPH CLARK, a witness on behalf of the plaintiff-, being first duly sworn and examined in chief by Mr. Zane, testified as follows:

Q. Were you acquainted with the city of Ogden, the streets, and the ownership of property between the depot down here and the three blocks up to Washington avenue?

A. Yes, sir.

Q. Now, do you know the corner lot down near the depot owned by Geo. W. Murphy?

A. Yes, sir.

Q. On March 29th, 1892, do you know who was in occupation of that lot of ground—claimed to own it?

A. Geo. W. Murphy.

Q. Do you know whether Scudder & Carlson occupied that ground and were in possession and claimed to own it?

Mr. WHIPPLE: I object to that because it is immaterial who was in possession and who claimed to own it. The statute says
63 the owner.

COURT: I think it is competent evidence, especially in view of the plat that the defendant itself had made under its directions and through its officers.

Defendant's counsel excepted.

Q. Do you know who owns lot marked on this plat Scudder & Carlson?

A. Well, I can testify to the next lot unless this plat is incorrect. I know that Schudder & Carlson were the owners.

Mr. WHIPPLE: Of what?

A. Of that place occupied as a saloon at that time.

COURT: Joining the corner lot?

A. Close to Murphy. I cannot say whether it joined or if it does not, because I have not measured it.

Mr. WHIPPLE: Defendant objects because it is not the best evidence of ownership.

Objection overruled and exception taken.

Q. Now, the next, Mary Fitzgerald. Do you know on March 29th, 1892, whether or not she was in occupation of the property and claimed to own it?

A. I can only testify to that from my understanding that she did.

Mr. WHIPPLE: I object to that as immaterial.

Q. Did she have a tenant in there? Do you know that?

A. I cannot say that, either.

Q. Now, as to the next place, Clark, Emmett and Thompson.

A. I can testify as to that. I was one of the owners.

Q. You were the owner of it on March 29th, 1892, in connection with Emmett and Thompson?

A. Yes, sir.

COURT: Mr. Whipple, does the city, after having assessed these men, deny that they owned the property—after preparing the plat here by which they collected the tax and placed their names, deny that they owned the property?

64 Mr. WHIPPLE: We deny that the parties who were assessed or parties who protested are the parties whose names are upon this plat. Consequently we deny that they were the owners at the time they protested.

COURT: Mr. Whipple, don't you concede that the city collected taxes from these very persons whose names are shown here?

65 Mr. WHIPPLE: No, sir.

COURT: Do you deny that these persons whose names are there did not pay the tax?

Mr. WHIPPLE: Yes, sir: we deny that.

COURT: I think it is admissable; proceed.

Exception.

COURT: All this can go in under defendant's objection.

Q. Now, do you know about Mrs. Alice Forbes?

A. I do not.

Q. Do you know about Huso Deprizen?

A. No, sir.

Q. Do you know about Job Pingree?

A. Yes, sir.

Q. He was in occupation of the lot and claimed to own it?

A. Yes, sir.

Q. Mathis Biel?

A. Yes, sir.

Q. John M. Major?
A. I do not know.
Q. Adam Patterson?
A. Yes, sir.
Q. John A. Morrison?
A. Yes, sir; I know that.
Q. George W. Lashus?
A. Yes, sir.
Q. Jennie A. Fisher?
A. I do not know that.
Q. Now, on the other side of the street, J. K. McLean?
—. I do not know that.
Q. William Graland?
A. I do not know.
Q. H. Madden?
A. I do not know that.
Q. Rebecca McKee?
A. I do not know.
Q. Patterson & Healey?
A. I do not know.
Q. Patterson & Clark?
A. I know that.
Q. Harriet A. Lewis?
A. I do not know that.
Q. William Driver?
A. Yes, sir; I know that.
Q. I. R. Rogers?
A. No, sir.
Q. William Chapman?
A. Yes, sir.
Q. I. R. Rogers?
A. Do not know that.
Q. J. H. Cordon, or Cardon?
A. Well, I know that. I know both of these lots.
Q. Joseph Clark, that is yourself?
A. Yes, sir.
Q. Christopher Fitzgerald?
A. I do not know.
Q. That Charles Coonley?
A. I know that.
Q. Now, coming down on this lot, R. A. Wells?
A. I know that.
Q. C. I. McKee?
A. I know that.
66 Q. John Collier and Mattie Gray?
A. I do not know.
Q. Carrie Lewis?
A. I do now know that.
Q. Charles Fuchs?
A. I know that he was in possession of that lot and——
Q. Catherine Lafferty?

A. I do not know that.
Q. Lawerence Scanlan?
A. No, sir.
Q. Elizabeth Hanswell?
A. I do not know that.
Q. Mary Ann Warner?
A. I know that.
Q. Bernard Dunn?
A. Yes; I know it now, but did not at that time.
Q. You know that he was in occupation then?
A. Why, I can state that I know that he was in occupation of it at that time.
Q. John Pincock?
A. I do not know that.
Q. Eccles Lumber Co.?
A. Yes, sir.
Q. H. I. Griffin?
A. Yes, sir.
Q. W. J. Stephens?
A. Yes, sir.
Q. John C. Stephens?
A. Yes, sir.
Q. The 77th Quorum of 70's?
A. I do not know anything about that.
Q. You know that there is church property down there belonging to the Quorum of Seventies?

Mr. WHIPPLE: I object to that.

A. I know they are in possession, but as to who or whether that was the name that it was going by I cannot say.
Q. At any rate, it was property in connection with the church?
A. Yes, sir.
Q. Do you remember the Ogden School property?
A. Yes, sir. I think they owned it.
Q. Now, the other side of the street, the Nichols estate?
A. Yes, sir.
Q. Who is Geo. W. Kerr?
A. Geo. W. Kerr is the depot master.

Mr. WHIPPLE: Let me ask you what use you are going to make of this evidence?
Mr. ZANE: We will use it for all legit-mats purposes, after we get it in.

Q. Now, C. F. Taylor? Do you remember that?
A. I do not know that.
Q. W. C. Warren?
A. He did not own it at that time.
Q. Who did own it at that time?
A. Charles F. Krouch. My best recollection is that Mr. Krouch did own it at that time.
Q. Boston Reality Co.? That is Mr. Peery. Don McGuire?

A. I cannot say.
Q. Emma Munns Lindsey?
A. She owned that property.
Q. Her name was formerly Emma Munns?
A. I think that was her maiden name.
Q. Mary A. Stephens—she is your sister?
A. Yes, sir.
Q. She owned that lot at that time?
A. Yes, sir.
Q. Daniel M. Stephens?
A. He is my brother-in-law.
Q. Did he own that lot at that time?
A. Yes, sir.
Q. S. C. Stephens?
A. The title was then in them at that time.
Q. A. C. Baker—do you know about that?
A. I cannot tell.
Q. David H. Stephens?
A. The title was in Stephens at that time.
Q. S. C. and W. T. Stephens owned a piece of ground there?
A. I could not declare on that; it is my opinion that it was.
Q. H. D. and J. S. Lewis?
A. The title was in them at the time.
Q. Do you remember about Ann Horrocks' and James E. Horrocks' two-story building?
A. Yes, sir; it was in them.
Q. Reese Howell?
A. I cannot say.
Q. Now Ann Horrocks and James E. Horrocks?
A. The title was in them at the time.
Q. John Maguire?
A. I cannot say.
Q. James H. Spargo?
A. I cannot say.
Q. D. H. Perry, Jr.?
A. That I cannot say.
Q. George W. Murphy—another lot, small lot?
A. I cannot say as to that.
Q. Sarah E. Binford?
A. I cannot say as to that.
Q. J. H. Watkins?
A. The title was in him.
Q. E. J. Watkins?
A. Yes, sir.
Q. D. H. Perry?
A. I cannot say as to that.
Q. W. H. Stephens?
A. The title was in him.
Q. Fred. J. Kiesel and others?
A. I cannot say.
Q. Karl Sorenson?

A. The title was in him.
Q. Rosa Kasten?
A. I do not know.
Q. Morris Livingston?
A. I cannot say as to that.
Q. Willard Kay?
A. Willard Kay, the title was in him.
68 Q. Hamoni Grix?
A. It was in him.
Q. H. T. O'Dell?
A. I do not know.
Q. Joseph Morely?
A. The title was in Morely.
Q. John Broom?
A. The title was in John Broom.

Cross-examination by Mr. WHIPPLE:

Q. Now, tell me how you know that title was in R. A. Wells.
A. The fact is that I know it in the same way that I know that Mr. —— lives next to me—occupies and owns the lot.
Q. Did you ever examine the records?
A. No.
Q. Well, it is possible that he did not own it?
A. It is possible.
Q. Now, in fact, you do not know whether he owned it or not; you won't swear positively that he owned it?
A. Yes; I will swear to the best of my judgment.
Q. Will you swear that the record title was in his name on March 29th, 1892?
A. Yes, sir.
Q. Now, you will swear that the record title was in C. I. McKee on that piece of property?
A. No, sir; I did not say that.
Q. Will you swear that the record title was in John Collier and Mattie Bray to this piece of property?
A. No, sir.
Q. Will you swear——

Mr. ZANE: We object to that *is* immaterial. He cannot swear as to the record title. He did state that he was in occupation of it and claimed to own it.

COURT: That is as the court understands it; that he testified the persons he has named were in possession and occupied it.

COURT: I do not think, Mr. Whipple, it requires a higher ownership in property in order to assess for paving tax than it does for county and territorial taxes.

Q. Now, then, tell me how you know that Charles Fox was the owner and had possession of that property at that time.
A. Well, in the case of Charles Fox, Mr. Fox told me
69 that he owned that building there and he occupied it.

Q. He told you so?
A. Yes, sir.
Q. You do not know whether he was stating it falsely or not?
A. No, sir.
Q. He may not have been in possession and owned it then. You do not know anything of your own personal knowledge?
(No audible answer.)
Q. Catherine Lafferty—how do you know that she was——
A. I did not state that she was.
Q. Take the next, Lawrence Scanlan?
A. I do not know.
Q. Elizabeth M. Hansell?
A. I do not know.
Q. How about Bernard Dunn?
A. I do not know anything about that.
Q. How about John Pincock?
A. I know that he was in possession of a piece of ground.
Q. Do you know?
A. From his statement.
Q. Now, you know this from what he told you only?
A. I had no reason to doubt it.
Q. You do not know it from any other source?
A. He has been around, and it has lead me——
Q. You do not know anything more?
A. I never went to see the record.
Q. How do you know that the Eccles Lumber Company was——
A. I did not state that I did know.
Q. How do you know that H. I. Griffin was in possession?
A. From the fact that Mr. Griffin has made that statement, and he has been doing business there.
Q. Then all you know is that he told you so and you seen him doing business there?
A. Yes, sir.
Q. Do you know that he did business on his own lot?
70 A. I do not guess that he would do it on another lot.
Q. I want to know what you know about it. Do you know that he is not located down here one hundred feet nearer the corner of the street, as a matter of fact?
A. I think I could guess pretty near where he is located.
Q. Well, how many feet—guess at it—that he is located from Lincoln avenue?
A. From Grant avenue he is located probably—Mr. Griffin is from about fifty to sixty feet this side of the center of the block.
Q. Now, what do you know about W. C. Stephens? How do you know that he was in possession of that piece of property described here?
A. Only from his claim.
Q. Just because he claimed it? You do not know anything about it?
(No audible answer.)
Q. You do not know anything about the Quorum of Seventies?

A. No, sir. I know they have been in possession for a good many years.

Q. What do you know about Geo. W. Kerr, this Nicholas estate?

A. All I know about that is that Mr. Kerr is one of the administrators of that estate, and that they have occupied it.

Q. Who has occupied it?

A. John Nichols and his offspring, wife and family.

Q. Did Mr. Kerr live there?

A. No, sir.

Q. Then Mr. Kerr——

A. Is administrator.

Q. What do you know about C. F. Taylor?

A. Nothing.

Q. You do not know whether he occupied it?

A. I did not testify that I did.

Q. How about Charles F. Krouch?

A. The answer must be the same as the other. He claimed the property. I know that he claimed it at that time that you are now mentioning.

71 Q. That he claimed this identical piece of property?

A. Yes, sir.

Q. You are sure that it is the same as represented on the map?

A. Yes, sir—that is, I should guess from the——

Q. You guess at it?

A. You could not expect me to say positively that that is positively his piece of grounds.

Q. Yes, sir; I do.

A. How can I do that when I have——

Q. Well, you are testifying that he owned this.

A. I am testifying that he claimed it.

Q. This particular piece of property, how do you know that that is the particular piece?

A. From the fact that he has got it marked out.

Q. If it was marked up here——

A. That is not marked.

Q. If it was marked 100 feet—off here—what would you say—it was there?

A. Why, I would not have any reason to dispute it.

Q. In that case you would be as certain as you are now?

A. No, sir; I would have to guess it. The way you asked me now is, how far Murphy's place was, I guess.

Q. You are guessing at most all of this testimony?

A. No, sir.

Q. Guessing mostly?

A. I think I am hitting it all right.

Q. You are guessing?

A. As to the location, I have to. I could not say unless that was marked.

Q. What do you know about the Boston Realty Co.?

A. I do not know anything.

Q. What do you know about Don Maguire?

A. Nothing.
Q. What do you know about Emma Lindsey?
A. I know she has occupied and claimed that piece for ten or twelve years.
Q. Do you know that is the particular place which is occupied?
A. I should judge from the location of it.
72 Q. Are you quite sure she did not live 50 feet east?
A. No, sir.
Q. You are not sure that she did not live 50 feet west?
A. No, sir.
Q. What do you know about Mary A. Stephens?
A. I know that she owns property there.
Q. Where does she *won* property?
A. I presume where it is marked.
Q. That is the reason you presume that is the side of the street?
A. I can tell you the side of the street, but when it come- to telling you the identical spot, why, then——
Q. Then you don't know anything about that?

COURT: I think the court understands his testimony on this very fully. I do not like to dictate, but it seems that you are taking up the time of the court on the matter.

Mr. WHIPPLE: I do not like to have the court make my record, either.

Q. What do you know about S. C. Stephens?
A. I know that he claimed the property at the time.
Q. You would not know that he claimed any property if you had not seen his name on this map?
A. I think so; yes, sir.
Q. Suppose it had been located 100 feet west of it, would you say that he owned this particular strip that is marked on this map?
(No answer.)
Q. Now if instead of being 21 feet it had been marked 40 feet front, would you still say he owned the property and was located on it?
A. I do not know anything about it. All I know is he owned property in this vicinity. I could not tell whether it was. If you want me to testify that I know that it is the identical place, I will not try to.
Q. You mean that you cannot do it?
A. I mean that I cannot measure his property.
73 Q. You mean that you cannot testify that that is the identical property that he owned or occupied?
A. I will testify that he owned property there—that is all testified—in that block.
Q. What do you know about S. C. and W. J. Stephens?
A. I know that they owned property there.
Q. Do you know how much front they owned?
A. No, sir.
Q. You do not know whether they owned 65 feet or 400 feet?
A. All I know is that they owned property in that vicinity.

Q. How do you know that they owned property in that vicinity at that time?

A. I have a good many reasons.

Q. Well, state some of them.

A. Some of them was that they told me so. They said so. I saw them in possession of it.

Q. That is all you know about it?

A. That it all the reason that I have to think that a man is the owner, to see him collecting rents and——

Q. What do you know about H. D. and J. S. Lewis?

A. I know that they owned property at the time.

Q. Do you know as a matter of fact that it did not stand in the name of J. S. Lewis?

A. I think so.

Q. Are you sure?

A. Yes, sir.

Q. Are you sure that it did not stand in the name of H. D. Lewis?

A. I do not know anything about that.

Q. This may be a mistake, then. Is that a fact?

A. No, sir; not a mistake that they were both the owners.

Q. That both of them?

A. I know of plasters on it, and——

Q. What do you mean by that?

A. I mean mortgages, indebtedness, and things of that kind.

Q. Is that all the reasons that you know that they owned the property or that they did — own it?

74 A. The only reason I know that they owned it was that they told me they owned it; that they offered to sell it to me.

Q. What do you know about Don Maguire?

A. Not a thing.

Q. What do you know about Geo. W. Lashus?

A. I know that Mr. Lashus has been in possession over there for a good many years; also claims to be the owner.

Q. That is all you know about it?

A. That is all.

Q. What do you know about Adam Patterson?

A. Adam Patterson is my partner in property down on that street; every reason to believe that — owned —.

Q. What reason?

A. From the fact that he told me. He never showed me the deed.

Q. You never examined the records?

A. No, sir.

Q. You do not know anything about it?

A. No, sir.

Q. What do you know about John M. Major?

A. Nothing.

Q. What do you know about Mathias Biel?

A. I know that he has been in possession there.

Q. Do you know whether he owned the property or not?

A. Yes, sir; outside of a little plaster.

Q. How do you know?
A. From the fact that he told me.
Q. How about Elizabeth Brall. What do you know about her?
A. Not a word.
Q. What do you know about Job Pingree?
A. I know that he owns property down there.
Q. Do you know that he owns this property, this particular piece of property?
A. I could not say whether it was 250 or 260 feet.
Q. How about J. C. Armstrong?
A. I know that he has been in possession of that property down there for a long time and was at that time.
75 Q. You do not know anything about Alice Forbes?
A. No, sir.
Q. Nor Mr. McCockie?
A. No, sir.
Q. Now, in whose name does this piece stand?
A. In Clark, Emmet, and Thompson. I own one-half, Mr. Emmet owns a quarter, and Mr. Thompson the other quarter.
Q. How about Mary Fitzgerald? Do you know anything about that?
A. All I know is that she was in possession at that time and built a building.
Q. You do not know whether she built it to rent to somebody else?
A. No, sir.
Q. You do not know, in fact, whether she owns it or not?
(No audible answer.)
Q. How about William Garland?
A. I do not know anything about it.
Q. How about Mr. Madden?
A. I do not know that.
Q. And Rebecca McKee?
—. I don't know anything about that.
Q. Patterson and Healey?
A. Yes, sir; they owned right alongside——
Q. Of whom?
A. Of Clark and Patterson.
Q. Is this your name—Clark, Patterson, and Clark?
A. Yes, sir.
Q. What interest did you own in that land?
A. One-half.
Q. Did you own in March, 1892?
A. Yes, sir.
Q. Did Mr. Patterson own an interest in that at this time?
A. Yes, sir; he also owned 25 feet.
Q. How about William Chapman? Do you know anything about that?
A. Well, William Chapman, I do not know whether he owned it at that time or not.
Q. How about J. H. Cordon?

A. I know that he owned it at that time.
Q. How do you know that he owned it?
A. Because he had possession.
76 Q. Is that all?
A. He bought there after I did. I joined him.
Q. What land have you got there?
A. I have got 40 feet.
Q. Adjoining Mr. Cardon?
A. Yes, sir.
Q. What do you know about Ann Horrocks and James E. Horrocks?
A. I know they have been in possession of that corner for 15 years.
Q. Who has been in possession, Ann Horrocks and James E. Horrocks?
A. James Horrocks, Sr.
Q. Do you know who owns it in fact?
A. It belonged to James Horrock- before he died. I presume it belonged to Ann Horrocks and James E. Horrocks.
Q. You are certain that it belonged to James Horrocks before he died?
A. I am satisfied that it was James Horrocks', Sr., until he died.
Q. How are you satisfied?
A. Well, I have no reason, only that was the way it was represented.
Q. Who represented it?
A. Why, Mr. Horrocks.
Q. He simply told you that he owned it?
A. Yes, sir.
Q. How about Reese Howell?
A. I do not know anything about that.
Q. Now, how about Ann Horrocks and James Harrocks in this next piece?
A. That is part of the estate.
Q. Part of what estate?
A. James Horricks'.
Q. Now, you say it stood in the name of James Horrocks at that time, March 29th, 1892?
A. Yes, sir—that is, it is his estate.
Q. I asked you who owned the land on March 29th, 1892.
A. Well, I should claim that it was as it is now then.
Q. Why do you claim it was?
A. From the fact that I think James Horrocks was dead before that time.
77 Q. Do you know anything about Geo. Merphy owning land in this block?
A. No, sir.
Q. Do you know anything about Sarah E. Binford?
A. No, sir.
Q. J. H. Watkins?
A. Y-s, sir.

Q. How do you know he owned it?
A. Because he always had possession of——
Q. You know it from that reason only?
A. Yes, sir.
Q. Did he ever tell you that he owned it?
A. Yes, sir.
Q. Did you ever examine the records?
A. No, sir.
Q. You don't know as a fact whether he owned it or not?
A. I never examined the records.
Q. How about Morris Livingston?
A. I do not know.
Q. Willard Kay?
A. I know that he owns it or claims it.
Q. You don't know, in fact, whether he owned it at the time?
A. I never examined the records.

JAMES H. SPARGO, a witness called on behalf of the plaintiff and examined in chief by Mr. Zane, testified as follows:

Q. On March 29th, 1892, were you the owner of property in block 25, plat A?
A. Yes, sir.
Q. Look at this plat here. Is this the property, James H. Spargo, two-story building?
A. Yes, sir.
Q. Now, do you know about John Maguire owning on the other side of you?
A. He owned on the other side.
Mr. WHIPPLE: At that time?
A. Yes, sir.
Q. Now, do you know about D. H. Peery?
A. I am satisfied that he owned it at that time.

Mr. WHIPPLE: Now, if your honor please, if this map is a verity, what is the object of this testimony?

COURT: You objected for the reason that it only purported
78 to show the ownership of the property nearly a year after. Now they are proposing to show from the map the ownership of the property in March 29th, 1892. Your own objection, it seems, called this out.

Q. You remember Geo. W. Murphy, in block 25?
A. Yes, sir.
Q. And Sarah E. Binford?

Mr. WHIPPLE: I object unless he fixes the time.

Q. I am fixing it March 29th, 1892—Sarah E. Binford.
A. I think that she did.

Mr. WHIPPLE: I object to the question.

Q. Karl Sorenson?
A. I am satisfied that he did.

Mr. WHIPPLE: I object to the question because it is not certain.
COURT: He may answer. It can go in for what it is worth.

Q. Now, taking this, do you know about James E. Horrock- and Ann Horrocks, March 29th, 1892?
A. I am satisfied that they owned it.

Mr. WHIPPLE: I object to it.

Q. Now, Reese Howell, March 29th, 1892?
A. I am satisfied that he owned it.
Q. And Ann Horrocks and James E. Horrocks, in the next building?
A. Same answer.
Q. John Maguire?
A. Yes, sir.
Q. J. H. Watkins?
A. Said he owned it.
Q. And E. J. Watkins?
A. Yes, sir.
Q. D. H. Pe-ry, two-story building?
A. Yes, sir.
Q. W. H. Stephens, one-story frame?
A. Yes, sir.
Q. Fred. J. Kiesel and others, for street?
A. As to that I could not say. I am satisfied it was.

Mr. WHIPPLE: I object to his saying that he is satisfied.
COURT: He can testify to what he knows.

Q. Now, Carl Sorenson, do you know his claiming ownership and being in possession?
A. Yes, sir.
Q. And Rosa Kasten?
A. Not at that time.
79 Q. Do you know who was in possession and claimed to be the owner?
A. Yes, sir.
Q. Who?
A. James I. Dee.
Q. Morris Livingston?
A. I am satisfied he owned it.
Q. Well, do you know whether he was in possession and claimed it?
A. Yes, sir.
Q. Willard Kay?
A. Yes, sir.
Q. Lamoni Grix?
A. Yes, sir; I am satisfied he owned it at the time.
Q. Joseph Morely?
A. Yes, sir.
Q. And John Broom—Broom hotel?
A. Yes, sir.

Cross-examination by Mr. WHIPPLE:

Q. Now, do you know that Ann Horrocks and James E. Horrocks owned this particular piece of property at that time?

A. They were in possession of it at that time. I talked with him at different times about their building, their rooms, and drawing rents, and they said that that was their property.

Q. Is that all you know about it?

A. I do not know anything about the records.

Q. Now, then, you say that you are satisfied that John Maguire owned this particular piece of property. How do you know that?

A. For this reason: when I built my building here John Maguire said I have a wall there upon my building that I want to sell you a half interest in, and I could tell more, of course——

Q. That is the particular reason.

A. That is the particular reason.

Q. How do you know that Sarah E. Binford owned this particular piece of property?

A. I did not say that she did.

Q. How do you know that E. H. Watkins owned this?

A. He was in possession and asked me if I could get a tenant for his place.

80 Q. Do you know of anybody who owns property on that street who is not in possession?

A. Yes, sir.

Q. Then you do not pretend to say every man in possession of a piece of property there you say that he is the owner?

A. Not at all; not if he rents it from others.

Q. Simply because he told you that he owned it, that is what your base your opinion on?

A. Yes, sir.

Q. What do you know about Rosa Kasten?

A. I answered that a moment ago.

Q. About Morris Livingston?

A. He had the rooms there to rent at the time I was talking of buying the property.

Q. When was that you were talking of buying?

A. About that time.

Q. About what time?

A. It was about March, 1892.

Q. Are you sure that it was in March, 1892?

A. I am pretty sure.

Q. How do you know, simply your memory?

A. Because Dee bought it at that time, and we were trying to make a deal.

Q. James I. Dee owns it now?

A. No, sir; he does not.

Q. Who owns it now?

A. Kasten.

Q. Owns the Morris Livingston lot?

A. Owns the Thompson lot; it is part of the same building.

Q. It belongs to more then one party, does it?
A. Yes, sir; it does. It belongs to two parties.
Q. Who was the other partner?
A. James I. Dee at that time.
Q. Who else?
A. Morris Livingston.
Q. What made you say a moment ago that Morris Livingston owned that——
A. He owned this part of the lot.
Q. Don't you know as a matter of fact that because he owned half of it that he did not own it all?
A. What do you want to bother a fellow this way for?
Q. Because you said that Morris Livingston——
A. I said that he owned this part of it. It is one building with a partition in the center.
81 Q. You said that you did not know anything about Rosa Kasten?
A. I did not say any such thing. I said I believed she owned it then; that Dee owned a part of the building.
Q. How about Willard Kay?
A. I also said that Willard Kay—I am satisfied that Willard Kay owns it.
Q. What made you satisfied?
A. He occupies it; he owns it. He asked me if I could find a tenant at different times.
Q. Does he occupy it now?
A. Yes, sir.
Q. Did he occupy it then?
A. Occupied a part of it.
Q. And told you he owned it?
A. Yes, sir.
Q. That is all you know about it?
A. That is all I know.

Mr. WHIPPLE: The defendant moves to strike out the evidence of this witness, because it is not shown that he knew anything about whom owned the property.
(Motion was denied.)

J. C. ARMSTRONG, a witness called on behalf of the plaintiffs, duly sworn, testified in chief as follows:

Q. I will just ask you a question or two, and that is in regard to the ownership of Geo. W. Murphy on the corner lot down next to the union depot.
A. That is on the corner of 25th and Wall? Yes; he has been in possession of it ever since I have been in Ogden—for 10 or 12 years.
Q. Do you know about Scudder and Carlson being in possession of a lot there?
A. I do.

Q. In March—29th—1892, or thereabouts?
A. Yes, sir.
Q. Mary Fitzgerald?
A. Yes, sir.
Q. Clark, Emmet and Thompson?
A. Well, I do not know about those.
Q. M. McKoskie?
A. I do not know about him.
Q. Do you know about yourself, J. C. Armstrong? You
82 know that in March, 1892, you owned that lot?
A. Yes, sir.
Q. And you were in possession of it?
A. In possession of it for seven years.
Q. Was Job Pingree in possession of the next lot to you?
A. Yes, sir.
Mr. WHIPPLE: At that time?
A. Yes, sir.
Q. Mathis Beihl, was he in possession of the next lot?
A. Yes, sir.
Q. Elizabeth Brall?
—. I do not know about that.
Q. Do you know who claims to own that lot at the time—that is, between Biehl and Major?
A. No; I could not state.
Q. John M. Major, do you know about his ownership there?
A. He was in possession of that property in 1892.
Q. Adam Patterson, do you know about his possession?
A. He was in possession at that time.
Q. John A. Morrison, was he in possession?
A. In 1892; yes, sir; he was.
Q. Was Jennie Fisher in possession of that corner?
A. I do not know about Mrs. Fisher.
Q. On the other side. Was J. K. McLean in possession of that property in March, 1892?
A. I do not know.
Q. Do you know about H. Madden being in possession of property there?
A. I do not know.
Q. Rebecca McKee?
A. I do; yes.
Q. Do you know about Harriet A. Lewis being in possession of property there in March, 1892?
A. She was.
Q. William Driver?
A. He was.
Q. William Chapman?
A. Yes, sir.
Q. L. R. Rogers?
A. Now, I could not say.
83 Q. Christopher Fitzgerald? Do you know about his being in possession of property?

A. No, sir.
Q. Charles Coonley?
A. Yes, sir.
Q. In possession of that property in March, 1892?
A. Yes, sir.
Q. Well, go down to the next block, between Lincoln and Grant. Here is the Nicholas estate, Geo. W. Kerr?
A. Yes, sir.
Q. Corner of Lincoln & 25th St.?
A. Yes, sir.
Q. Now, do you know about C. F. Taylor, of San Francisco, whether he was in possession March, 1892?
A. He was.
Q. C. C. Warren, he owned that property at that time?
A. That property belonged to Mr. Gallagher, I believe, in Texas.

COURT: Let me ask this question: Is it denied, Mr. Whipple, that those protesting were not the owners of property and had the right to protest.
Mr. WHIPPLE: Yes, sir; I deny that. That is the issue.

An adjournment was here had until 9.30 a. m. Tuesday morning, Oct. 2nd, 1894.

OCTOBER 2ND, 1894—10.30 a. m.

F. B. DE VOTO, called on behalf of plaintiffs and examined in chief by Mr. Rogers, testified as follows:

Q. Now, Mr. De Voto, I show you a plat, which for the purposes of identification may be marked "Plaintiffs' Proposed Exhibit C," and ask you to examine the same and say if you made same from the records of Weber county, Utah Territory.
A. The plat, do you *mane*, Mr. Rogers?
Q. Yes, sir.
A. No, sir; I did not make the plat.
COURT: He asked you that.
Q. There is a plat upon these sheets. He asked me if I made the plat upon the records.
Mr. ROGERS: Withdraw the question. You may state if
84 you made this plat, the peper-writing, the names, and figures w-ere appearing.
A. Partly, I did; the figures showing the frontage—that is, the feet supposed to show the frontage of these blocks or lots that are made, I did not have anything to do with it.
Q. Who made this?
A. I do not know.

It was here admitted by the counsel for the defendants that the frontage stated upon plaintiffs' proposed Exhibit "C" is correct.

Q. Does that show who were the owners of property in these blocks on the 29th day of March, 1892?
A. Yes, sir; to the best of my knowledge they do.
Q. As evidence from the records of Weber county?

A. Yes, sir; it shows the names of the owners at that time.

Q. Now, what blocks are stated there?

A. Block 25, block 24, and block 19 and block 23, and block 20, plat "A," Ogden City survey.

Q. Now, on the 29th day of March, 1892, did D. H. Peery own any feet in that district; if so, how many?

A. D. H. Peery?

Q. Block 25, Mr. Devoto?

A. Yes, sir; he owns a piece.

Q. I have just wanted to know if he owned—had any frontage there?

A. I could not tell how much he owned; he owned some there.

Q. Read that.

A. That says twenty-nine feet. D. H. Peery is here marked for twenty-nine feet.

Q. In block 25?

A. Block 25.

Q. S. C. and W. J. Stephens, in block 19?

A. Block 24—in block 24, 14 feet and 65 feet—here marked 14 feet. That is all in block 24; none in block 19.

Q. How many feet?

A. 65 feet and 14 is what is marked on this plat.

Q. D. M. Stephens?

A. 21.75 feet, 21.45 feet, I do not know which, in block 24.

A. S. C. Stephens?

A. S. C. Stephens. I do not find any.

Q. Well, pass that for the present. W. J. Stephens?

85 A. W. J. Stephens, 21 feet in block 19.

Q. J. C. Stephens?

A. J. C. Stephens, in block 18, 19.80 feet.

Q. John Pincock?

A. John Pincock, in block 19, 22 feet.

Q. D. H. Stephens?

—. David H. Stephens, in block 24, 33 feet.

Q. Rebecca W. McKee?

A. Rebecca W. McKee, in block 2, 23.75 feet.

Q. Caleb L. McKee?

A. Caleb L. McKee, in block 19, 25 feet.

Q. Charles Reed and C. Fitzgerald?

A. That is in block 23, 25.75 feet.

Q. R. A. Wells?

A. R. A. Wells, in block 19, 40 feet.

Q. J. H. Spargo?

A. James H. Spargo, in block 25, 40 feet.

Q. John Broom?

A. John Broom, in block 25, 159.75 feet.

Q. Joseph Morley?

A. Joseph Morley, in block 25, 30 feet.

Q. Lamoni Grix?

A. L. Grix, 20.75 feet.

Q. C. F. Krauch?

A. C. F. Krauch, in block 20, 20.4 feet.
Q. G. W. Lashus?
A. G. W. Lashus, in block 20, 50 feet.
Q. J. M. Major?
A. In block 20, 52 feet.
Q. M. Biehl?
A. M. Biehl, in block 20, 52.50 feet.
Q. Charles Fuchs?
A. Charles Fuchs, in block 19, 25 feet.
Q. Geo. W. Murphy?
A. Geo. W. Murphy, in block 20, 207 feet.
—. Geo. W. Murphy again, in block 25?
A. In 25; yes, sir; 21.50 feet.
Q. James L. Dee?
A. James L. Dee, in 25, 12.50 feet and 19 feet.
Q. That would make 31.50 feet?
A. 31.50 feet.
Q. James Thompson?
A. James Thompson, 11.50 feet in block 25; it would be 12.25 feet.
Q. James E. Horrocks and Ann Horrocks?
A. James Horrocks and Ann Horrocks, in block 25, would be 65 feet.
86 Q. John Horrocks?
A. John Horrocks, 39 feet.
Q. W. Kay?
A. W. Kay, in block 23, 207.09 feet.
Q. Clark, Emmet, and Thompson?
A. Block 20, Clark, Thompson, and Emmet, 25 feet.
Q. Joseph Clark?
A. Joseph Clark, in block 23, forty feet.
Q. Clark and Patterson?
A. Clark and Patterson, in block 25, fifty feet.
Q. Harriet A. Lewis?
A. In block 23, 25 feet.
Q. Quorum of Seventies?
A. Quorum of Seventies, in block 19, 40 feet.
Q. Scudder and Carlson?
A. In block 20, 22 feet.
Q. J. H. Cardon?
A. In block 23, 24 feet and 20 feet—44 feet altogether. Right here there is a surplus of three feet. I do not know whether the surplus is included in that forty-four feet or not. I could not say. There is a surplus, I know, in that block.
Q. Right in that place?
A. Yes; in that place.
Q. You are familiar with it?
A. Yes, sir.
Q. J. C. Armstrong?
A. J. C. Armstrong, in block 20, 79.2 feet.
Q. C. F. Taylor?
A. C. F. Taylor, in block 24, 93.4 feet.

Q. Emma Munns Lindsey?
A. In block 24, 30 feet.
Q. John Maguire?
A. In block 25, 22.50 feet.
Q. Adam Patterson?
A. Adam Patterson, in block 20, 25 feet.
—. H. *B.* Lewis?
A. H. D. Lewis, a half interest in 68.4 feet.
Q. Then the half of the interest would be 34.50 feet?
A. 34.2.
Q. J. H. Watkins?
A. J. H. Watkins, in block 25, 20.62 feet.
87 Q. F. J. Watkins?
A. F. J. Watkins, in block 25, 20.62.
Q. William Chapman?
A. William Chapman, block 24 or 23, 41 feet.
Q. Mary Fitzgerald?
A. Mary Fitzgerald, in block 20, 25 feet.
Q. C. Sorenson?
A. Block 25, 17 feet.
Q. John Nichols, Gomer Nichols, Jane A. Nichols, Leslie Nichols. How have you got it on the plat?
A. John, Gerner, Jane A., Rose, and Leslie Nicholas, 133.4 feet.
Q. I will thank you to examine your records and see if that name should not be Gomer instead of Garner.
A. Yes, sir; I think it should; but I could not tell.

Mr. WHIPPLE: If that is a fact, it can go in.

Q. John Nichols, Gomer Nichols, Rose and Leslie Nichols, how many feet?
A. 133.4.
Q. Job Pingree?
A. In block 20, 29.50 feet.
Q. M. A. Warner?
A. M. A. Warner, in block 19, 54 feet.
Q. Elizabeth Hansell?
A. In block 19, 45.5.
Q. J. A. Morrison?
A. J. A. Morrison, in block 20, 24 feet.
Q. D. H. Peery, Jr.?
A. In block 25. Well, I have not D. H. Peery, Jr. I have David Henry, Jr.
Q. That is the gentlemen.
A. 20 feet.
Q. Realty Co.?
A. In block 24, 62.4 feet.
Q. H. Madden?
A. H. Madden, in block 23, 25 feet.
Q. David Evans? Does that stand in the name of Evans, Rogers, and Peery?
A. David Evans, 26.6 feet and 35.1 feet—total, 61.3 feet.

Q. L. P. Birchfield?
A. L. P. Brichfield, block 33, 50 ft.
Q. Harriet Livingston?
88 A. Harriet Livingston, block 25, 19 feet.
Q. The city hall block is situated on 25th street, between the west line of Wall avenue and the west line of Washington avenue, is it not, and was so situated in March, 1892?
A. City hall block situated between the west line of Washington avenue and the east line of Grant, on the south side of the street; yes, sir.
Q. Within the alleged paving district?
A. Well, I do not know anything about that; I do not know what the paving district is.

Mr. WHIPPLE: Well, it is admitted that is right; there is no controversy about that.
COURT: How many feet are there in the city hall block?
Mr. WHIPPLE: 660 feet.

Mr. ROGERS: Now, inviting your attention to block 19, in the same geographical boundary, I will ask you how much Ogden City corporation owns there fronting on 25th street?
A. 125 feet.
Q. Now, were you acquainted with Elizabeth Hansell, who was generally known as Mrs. Lizzie Wadman?

Mr. WHIPPLE: I object, because the witness is not on the stand for that purpose.
COURT: The witness is on the stand for any purpose that counsel desires to make of him.

Q. Were you acquainted with her?
A. I have a recollection that I was acquainted with her about 1886 or 1887.
Q. Well, you and I were pretty well acquainted along over there in 1886 and 1887?
A. No, sir.
Q. I will ask you if you remember where she lived, across from the Central hotel.
A. No, sir.
Q. I will ask you if you know that Elizabeth Hansell and Liddie Wadman are one and the same person.
A. Except from records in our office; she so states in some
89 deeds or papers that passed through our hands in the last month.
Q. That she is one and the same person?

Mr. WHIPPLE: I object to the answer, and move to strike out for the reason that it is incompetent.
Mr. ROGERS: It is offered for the purpose only of showing title. We propose to show hereafter, if your honor please, by other testimony that the protest of this identical piece of property which stood upon the records in the name of Elizabeth Hansell was signed by

her and signed by the name of Liddie Wadman, she going under that name.

COURT: The question is whether you can prove that fact by a deed in this man's possession.

Mr. ROGERS: I ask you if you know them to be one and the same person?

A. I do not know the person at all that I know of.

Q. Did you know her in '86?

A. I believe I did, when she lived across from the blacksmith, John Nichols. I do not know whether she is dead or alive.

Mr. WHIPPLE: I move to strike it out.

Mr. ROGERS: I will not press it at the present.

Cross-examination:

Q. Have you stated all the names of owners of property in the alleged district, as stated by you in the first part of the examination?

A. No, sir.

Q. You may state the others.

A. I did not check them off.

Q. Well, you may give the names of all the owners of land as shown by your plat in your possession in block 23.

Mr. ZANE: We object to that, if your honor please, as being wholly immaterial. It is immaterial who these other people are who owned property there at the time.

Mr. WHIPPLE: We have the right to ask the names of
90 these persons, with the frontage owned by them, for the purpose of showing them that they were not the persons protesting about the time.

After argument, Mr. Whipple stated: I ask now the same privilege that Mr. Zane had, of withdrawing the admission that that represents the frontage in feet.

After some further argument, the court overruled the objection of plaintiffs' counsel; to which plaintiff- excepted.

Mr. WHIPPLE: State the names.

A. Block 23?

Q. Yes, sir.

A. I do not believe I mentioned William Garland's name.

Q. Any others?

A. L. P. Burchfield.

Mr. ROGERS: That went in with ours.

WITNESS: I cannot take them out.

Q. Pick them out.

A. William Garland, with 30 feet; Adam Patterson and Patrick Healey, 25 feet.

Mr. ROGERS: That was gone in with us.

Q. William Driver, with 50 feet; Charles Coonley, with 97 feet. These are all I remember that were mentioned in this.

Q. Now, all the names in block 24 that you have not previously stated.

A. Block 24—Patrick H. Gallagher, 40 feet; Don Maguire, 30 feet; Almira C. Baker, 21.25 feet; Mary Ann Stephens, 14 feet; Alimira C. Baker, 7.50 feet. That is all.

Q. Block 25?

A. In block 25—Reese Howell, 21 feet; Sarah E. Binford, 21 feet; William H. Stephens, 12.25 feet; H. J. O'Dell, 18.83 feet. That is all.

Q. In block 18?

A. Block 19—John Collier and Mattie Grey, 25 feet; E. J. Lewis, 25 feet; Catherine Lafferty, 25 feet; Rev. Laurance Scanlan, 55 feet; Bernard Dunn, 23 feet; Herbert L. Griffin, 19.8 feet; Zilpha J.——

Mr. ROGERS: I am advised that I have left out two names.
91 I will put them in hereafter.

COURT: You may put them in afterwards.

WITNESS (continuing): Zilpha J. Stephens, 59.6 feet. That is all I see.

Q. Now in block 20?

A. In block 20—Michael McCoskey, 79.7 feet; Alice Forbes, 10 feet; Ella Deprizin, 40 feet; Elizabeth Biehl, 19 feet; Jennie Fisher, 66 feet. That is all.

Q. Now did the union depot and railway company own any property abutting upon the plat, as shown in that plat?

Mr. ROGERS: We object, as not being within the paving district.

Mr. WHIPPLE: It cannot effect the plaintiff injuriously that this block goes in, for the reason that it only lessens their *pro rata* of the assessment.

COURT: The question is, is it within the paving district? The court thinks under the ordinance it is not.

After further argument the court sustained the objection and gave defendant an exception.

Mr. WHIPPLE: I will ask to offer this map in evidence, this whole list, showing the names and frontage in the district in question in this suit.

Mr. ZANE: We object to so much of it as purports to show that the depot had any frontage there.

Mr. WHIPPLE: Do you admit it for all other purposes?

COURT: The court has ruled that it is proof. It may be admitted.

(Same was marked Defendants' Exhibit 1.)

(Redirect examination by Mr. ROGERS:)

Q. Was H. L. Griffin, on March 29th, 1892, owning property on 25th street between the west line of —— avenue and the west line of Washington avenue? and state the number of feet frontage.

A. In block 19, 19.8 feet.

92 COURT: Is this the same H. L. Griffin whose name was mentioned?

A. Yes, sir.

Q. Now, take the name of William Driver. State what he ow-ed on that day on that street.

A. William Driver, in block 23, 50 feet.

COURT: That is the same person named in the cross-examination?

WITNESS: Yes, sir.

Q. These plats which have been introduced in evidence and marked Exhibit "C" represent these blocks situated upon 25th street between the west line of Washington and west line of Wall avenue, do they not?

A. They represent those portions of these six blocks on that street.

Q. And each of these blocks is 660 ft. long, fronting on 25th street?

A. That is something I cannot say. The blocks are supposed to be 660 feet, but there is a surplus in every block in the addition.

Q. Of how much?

A. It varies.

Mr. WHIPPLE: Excuse me, this is in for the frontage only.

Mr. ROGERS: We are not disposed to press it for the reason that the city itself has said that the district consists of 3,960 feet.

D. H. PEERY, JR., being first duly sworn, examined on behalf of the plaintiff- by Mr. ROGERS, testified as follows:

Q. Mr. Peery, on the 29th day of March, 1892, were you living in Ogden city?

A. Yes, sir.

Q. And prior to that time you were also living there?

A. Yes, sir.

Q. Were you a property-holder on 25th street, in this city, at that time?

A. Yes, sir.

Q. I will ask you if along about that time you became
93 acquainted with a protest concerning the paving of 25th street in Ogden city.

A. Yes, sir.

Mr. ROGERS: We have served written notice, if your honor please, in compliance with the statute, upon council for the opposite side to produce a written protest which was made by our clients and others on the 29 day of March, 1892, and which protest was on that day, at 9.55 o'clock a. m., delivered to the city recorder of this city. I understand from counsel he is unable to produce it.

Mr. WHIPPLE: I never saw the protest, your honor; before I became city attorney Mr. Kimball was city astorney. I have endeavored to find them, but we could not do so.

COURT: I presume the absence of it is sufficiently shown to permit oral testimony of it.

Mr. ROGERS: I will ask you, Mr. Perry, if you saw that protest?

A. Yes, sir.

Q. Was it in writing?

A. Yes, sir; as I remember it. I would not be certain whether it was typewritten or not.

Q. Was it in writing?
A. Yes, sir.
Q. Either with a pen or typewriter?
A. Yes, sir.
Q. Did you have it in your possession?
A. Yes, sir.
Q. Did you sign it?
A. Yes, sir.
Q. Do you remember whose name was at the head of it?
A. I think D. H. Perry.
Q. Your father?
A. Yes, sir.
Q. Do you remember who signed it last?
A. Well, I remember—I have been looking over a supposed copy of it here; I would not remember that if it was not for that. I see I signed it last for Mr. Birchfield.

Mr. WHIPPLE: I object to that.
COURT: Yes, unless that refreshes his recollection.

—. I do remember of signing it last, after seeing it.
94 Q. Your recollection has been simply refreshed?
—. ——.
Q. Did you sign for the Realty Company?
A. Yes, sir.
Q. As its agent?
A. Yes, sir.

Counsel for defendant here objected to his stating his agency for the Realty Company without producing his authority for it.
It was agreed that the objection might be made *pro forma* and argued upon afterwards.

Q. You signed the name of the Realty Company, by you as its agent under that authority, to this protest?
A. Yes, sir.
Q. L. P. Birchfield. Did you sign the name of L. P. Birchfield, as his agent, to this protest?
A. Yes, sir.
Q. You were authorized to do so?
A. Yes, sir.
Q. Inviting your attention to a piece of property situated in block 23, known as the Chapman House property, I will ask you if you signed your name protesting against that?
A. Yes, sir.
Q. Who signed with you?
A. L. R. Rogers.
Q. Inviting your attention to the property in block 25 owned by you, did you sign your name to the protest against that?
A. Yes, sir.
Q. 20 feet in your own name, 62.4 feet in the Realty Co.'s name?
A. Yes, sir.

Q. And 61.7 feet in the name of Evans, Rogers and Peery?
A. Yes, sir.
Q. And 50 feet in the name of Birchfield?

Mr. WHIPPLE: I understand this objection reaches the fact that where they are joint tenants that one joint tenant cannot sign for the others.

COURT: The court will pass upon that later, Mr. Whipple. We will admit the testimony.

A. Yes, sir.
95 Q. Mr. Peery, what did you do with that protest?
A. I took it to the city recorder's office.
Q. At what place?
A. At the city hall in Ogden.
Q. In the morning?
A. Yes, sir.
Q. Who went with you?
A. My remembrance is that L. R. Rogers was with me.
Q. What, if anything, was done there with the protest?
—. I requested Mr. Bryan, who was the recorder, to file it and place the time of filing on the paper, which he did.
Q. Did he do so?
A. Yes, sir.
Q. In your presence?
A. Yes, sir.
Q. You remember the day that was?
A. I would remember, except from——
Q. Was it not the date fixed?
A. It was the day fixed in the notice of intention; I remember that the time would expire at 10 o'clock.
Q. And it was filed before 10 o'clock that morning?
A. Yes, sir.
Q. Inviting your attention to the head of the petition, the name D. H. Peery, was that signed by your father?
A. I am not certain about that; it is my impression it was signed by him or I would have signed it as representative. I am not certain about that unless I would see the petition.

Mr. WHIPPLE: The defendant objects; he is not shown to be competent.

Mr. ROGERS: Do you know your father's handwriting?
A. Yes, sir.
Q. Now, would you have some recollections of the way that protest read if I was to recall it to your mind and refresh your memory?
A. Yes, sir; I think I would.
Q. To the common council of Ogden city. Gentlemen: We, the undersigned, property-owners on 25th street, between the
96 west line of Wall avenue and the west line of Washington avenue, and which is designated as paving district No. 2, hereby protest against the levying of any local assessment against

or upon our property for the purpose of paving said street within said district, and we represent to your honorable body that we are the owners in plat "A" of Ogden city of the following property, to wit. I will ask you, Mr. Peery, if your best recollection is that the protest was like that?

A. Yes, sir.

Mr. WHIPPLE: Is this for the purpose preliminary to introducing the protest, Mr. Rogers?

Mr. ROGERS: No, sir.

Mr. WHIPPLE: Well, go on, then.

COURT: I do not know whether the exact wording of the protest is in question, but whether there is a protest.

(Cross-examination:)

Q. Now, Mr. Peery, how many feet did you represent, if you can recollect?

A. Why, I represented 62.50 or a fraction for the Realty Company, fifty feet for Birchfield, 20 of my own.

Q. Now, is it true or is it not that you signed for your father?

A. My impression is that he signed it for himself, because I did not sign it until the last of it. If I had signed his, I would have followed it up with the others I represented.

Q. You do not know, as a matter of fact, who signed that?

A. I think it was signed by D. H. Peery.

Q. Is it not a fact that you were representing others besides this 62, 50, and 20 feet?

A. I do not know that I represented any that I had authority to sign for, to protest for.

COURT: You mentioned the Chapman house.

97 WITNESS: I owned one-third of it.

Q. That is not in with this?

A. In March, Evans, Rogers, and myself owned 60-odd feet, which is known as the Chapman property.

Q. What interest in it did you own?

A. One-third.

Q. Did you represent any other property than the Realty block?

A. Birchfield and the Chapman house and my own.

Q. That is, these four places?

A. Yes, sir.

Q. Did you not, as agent, sign to other pieces beyond that? Did you not sign for those you had for sale?

A. No, sir; I do not think so. If I had them for sale and signed, I had the right to protest for them.

Q. I will ask you whether or not you did not withdraw your protest?

Mr. ROGERS: We object as not proper cross-examination. That is their defense that they make here.

COURT: Is not the question of withdrawal involved in the question of whether or not he signed the protest?

Mr. ROGERS: We make the formal objection. We would prefer to keep it separate. We will make the formal objection that it is immaterial, irrelevant, and incompetent; and I would like to make this suggestion to the counsel before he asks that question, that he would fix the time when he withdrew.

COURT: He may answer it.

Exception taken by council for plaintiff-.

A. My remembrance is that I withdrew.

Q. Withdrew all this property that you signed for?

A. That is my remembrance. I am not dead certain about that.

Q. Well, what do you say?

A. That is my remembrance. It seems to me that there ought to be some papers on file with reference to that. I am not exactly certain on that point.

98 Mr. ROGERS: Now, if there is any question as to these withdrawals being lost, I will waive that.

Mr. WHIPPLE: If you will admit that the withdrawals are lost and cannot be found——

Mr. ZANE: Not all of them. We have copies of some.

Mr. ROGERS: We will take counsel's word for it without any cavil.

Mr. WHIPPLE (to witness):

Q. Do you remember the day you withdrew?

A. I do not, Mr. Whipple. I think I withdrew, but I do not remember the date.

Q. Now, you are positive that you and Mr. Rogers filed that protests?

A. I am certain that I filed it, and I am *partictially* certain that Mr. Rogers was with me.

Q. Now, what makes you certain about that, Mr. Peery?

A. Well, I remember the morning in the office. Since the matter has been talked about it has come to my memory. I remember one or two peculiar reasons.

Q. Is it not possible that it might have been some other morning than the morning of the last day of the protest?

A. No, sir; because——

Q. You are very positive?

A. Yes, sir. I do not think I had seen it until that morning.

(Redirect:)

Q. It was several days after the delivery of the protest with the city recorder that you withdrew any of your property from the protest.

A. I would not be certain about that, Mr. Rogers, when it was that I withdrew.

Q. I want your best recollections, Mr. Peery, as to about the
99 time, about how long—a week or ten days or two weeks?

A. I would not like to swear to that proposition, because I have very little memory about the length of the time. I think it was a few days afterwards.

Q. Two days?
A. A few days is my remembrance.

(Recross:)

Q. Now, Mr. Peery, you may state what authority you had to sign for the Boston Realty Company.
A. Why, I am the agent of the company.
Q. What were you the agent for—what was the agency?
A. To transact all business in conjunction with the building the same as if I owned it. I have been and am practically, so far as the authority with reference to the building, I am the owner of it. I sign leases and——
Q. You did not have any authority to sell the real estate?
A. Yes, sir.
Q. Did you have authority to make deeds?
A. I have written authority some place from the Realty Company.
Q. Was it a power of attorney?
A. Practically.
Q. Was it absolute?
A. Yes; it gave me authority to transact all business.
Q. Was it of record?
A. No; I never put it on record.
Q. What authority did you have to sign for Mr. Birchfield?
A. A written authority to act as his agent.
Q. Have you got that written authority with you?
A. I have, probably, some place. I have not got it with me.
Q. What was it, in the form of a letter?
A. Yes, sir; from Mr. Birchfield.
Q. You did not have a power of an attorney?
A. No, sir; did not have a power of attorney.
100 Q. What was the scope of authority by that letter?
A. *The* handle the property in every way.
Q. You mean to sell it as their agent?
A. To sell it, to pay taxes on it, collect rents, and——
Q. There was nothing said about signing protests for paving?
A. No; I do not think there was anything particularly said about hat.
Q. Nothing said about your petitioning for paving?
A. No, sir.
Q. Was anything said by the Boston Realty Company?
A. Thay have left their business absolutely in my charge. They did not pay any attention to it at all.
Q. You could not sign deeds to transfer it, could you?
A. I could do everything except that. I signed the leases.
Q. You could not put a mortgage on the property?
A. Well, I do not know that I could do that.
Q. Will you state whether that is a corporation or not?
A. Yes, sir; organized under the laws of the State of Maine.
Q. And president and secretary?
A. A president and secretary.
Q. Organized under the laws of the State of Maine?

A. Yes, sir.
Q. Has it filed its articles of incorporation here, do you know?
A. Yes, sir.
Q. Are you its president?
A. No, sir.
Q. Are you one of its officers?
A. I am its agent.
Q. Are you one of its officers, the president or secretary?
A. No, sir.
Q. Are you a director?
A. No, sir.
Q. You do not hold any official position in the corporation?
A. No, sir.

Mr. WHIPPLE: Now the defendants move to strike out all the direct testimony of this witness, as he has shown himself in-
101 competent.
Motion was denied.

Mr. ROGERS:

Q. The home office and principal place of business of the Realty Company of Kittery, Maine, is Boston, Mass.?
A. Yes, sir.
Q. At which place reside the president and secretary, treasurer, and board of directors of that corporation?
A. Yes, sir.

Mr. L. R. ROGERS, a witness on behalf of the plaintiffs, being examined by Mr. Zane, testified as follows:

Q. Your full name is L. R. I. Rogers?
A. Yes, sir.
Q. Residence, Ogden; occupation, lawyer?
A. Yes, sir.
Q. Do you remember about March 29th, 1892, of the filing of a protest against making of a local improvement on 25th street, in Ogden city?
A. I do.
Q. Were you residing in the city at that time?
A. I was.
Q. Did you have any connection with the protest?
A. I did.
Q. Do you remember of the protest being filed on the morning of the 29th of March, 1892, the date fixed in the notice of intention?
A. I remember that it was filed early in the morning, but as to the exact date I do not remember.
Q. Under what circumstances?

Mr. WHIPPLE: I object to that.
COURT: He can testify to the circumstances with a view to identifying the date.

Q. In company with whom were you at the time it was filed? Or *or* give any fact or circumstance.

A. Mr. Bryan and Mr. Peery.
Q. Do you remember what time of the day it was?
A. Early in the morning, before court opened, because I left the city hall and came here to court; the court was just opening.
102 Q. Do you remember whether any file-mark was put on the protest or not?
A. Mr. Bryan filed it at Mr. Peery's request.
Q. Do you remember the hour?
A. No, sir; I won't swear positively as to the hour. My best recollection about it is that it was nine something.
Q. A. M.?
A. A. M.
Q. Now, did you ever know——

Mr. WHIPPLE: I object to the incompetency of the testimony; it is not shown that it was filed in time.

Mr. ROGERS: I will state that it was filed on the day that the notice on intention called for. Of that I am certain and positive. The reason that I remember that it was that particular day was because after this protest was filed members of the city council came down to look at it, and then went up in the council chamber, and could not get a quorum of the members of the council, so the council adjourned. That is the circumstance that fixes the date in my mind.

Q. Did you ever know a man by the name of Maden?
A. Yes, sir.
Q. What is his full name?
A. Two Madens. One was Elwood Maden; the other was Hiram Maden.
Q. Do you know whether or not they were interested in certain property on 25th street, within the alleged paving district?
A. H. Maden held a deed——

Mr. WHIPPLE: I do not understand how that is *im*material, your honor. The evidence is already in as to the owners. It is cumulative.

WITNESS: Maden held a deed, fee-simple title, and I drew for him a declaration of trust of his brother Elwood owning an undivided one-half interest in it.

Q. Now, do you remember this protest——

103 Q. Mr. WHIPPLE: Before we leave that I want to object, your honor. This is very material, and it is a vital point in the case. That the council is not bound by latent equities, but only by what the record showed at the time.

COURT: The court does not think that is the rule.

Mr. WHIPPLE: I object to any latent equities or the fact that the deed was in existence if it was not on record.

COURT: We will pass upon that question when we come to it. Objection overruled.

Q. On that protest that was filed on that day, do you remember whether the names of H. and E. Maden were signed?

A. I signed the name of H. Maden. I signed the name of E. Maden, by L. R. Rogers, attorney.

Q. Were you authorized to do this?

A. At the time I was the attorney of both of these gentlemen. Afterwards they wrote me a letter stating (I will state, your honor, to save time, that the letter was destroyed by fire in this building and I cannot produce it)—a letter stating that they had learned from members of the city council that their name had been signed to this protest by myself as their attorney and agent; that they gave me full authority to act for them in the matter, and whatever I did with my own property they wanted me to do with theirs.

Q. In other words, they ratified what you had done?

A. Expressly so.

Mr. WHIPPLE: Now, the defendant objects, because they cannot prove a ratification after the act had been done.

COURT: The objection will be overruled.

104 Q. Do you remember a piece of property of 25th street called the Chapman House property?

A. I do.

Q. How was that owned at the time?

A. That was owned by David Evans, D. H. Peery, Jr., and myself.

Q. It consisted of 61.7 feet that is marked here?

A. There are two pieces of property aggregating 61.7 feet.

Q. Did you sign your name to that protest?

A. I did.

Q. And who signed D. H. Peery's name?

A. He signed his own.

Q. And whose name did the property stand in?

A. It stood in the name of David Evans upon the records, but Mr. Peery and myself had declarations of trust in writing from him.

Mr. WHIPPLE: The defendants object, because one tenant in common cannot sign a protest for his other cotenante.

Mr. ZANE: He did not say he signed it for Mr. Evans.

(To witness:) Did Mr. Evans sign it?

A. No, sir; I signed for Mr. Evans.

Q. Did Mr. Evans afterwards ratify your act in signing it?

A. He did, sir.

Q. Now, did you ever know a person that went by the name of Liddie Wadman?

A. Yes, sir.

Q. Did you ever know a person who went by the name of Elizabeth Hanson?

A. Yes, sir.

Q. Were they one and the same person?

A. They were. Her maiden name was Wadman; she married a man by the name of Hanson; got a divorce and resumed her

maiden name, and we were her attorneys in the divorce proceedings.

Cross-examination:

Q. You say that you signed that H. and E. Maden?
A. No, sir; I signed E. Maden, H. Maden, by L. R. Rogers, attorney.
105 Q. At that time you did not have any authority to sign, you say, did you?
A. Yes, sir.
Q. Then you did not have any?
A. Yes, sir; I did have.
Q. Do you say that you did have?
A. Yes, sir.
Q. What was that authority?
A. Why the Madens and I were interested together in real estate operations, and I attended to all their business for them at their special request, the same as if it was me own property.
Q. Did you have any special conversation with either of them about this particular piece of property in connection with this protest?
A. At that time I did not.
Q. Then, in fact, you signed it simply upon the strength of your right to do their business?
A. No, sir; I signed it in pursuance of my general authority from them.
Q. What was the scope of the authority?
A. To do with their property as I would do with my own, except that I had no written authority to encumber it or to sell it.
Q. Or mortgage it?
A. I could not convey the title or encumber the title.
Q. You could not make any real estate deal in that authority?
A. I had no power of attorney to sign their names to any instrument affecting the title to the property or encumbering the property.
Q. Now, in regard to this Chapman House property, do you say that you signed the name of David Evans?
A. I did.
Q. Mr. David Evans held the property—the title in his name?
A. Yes, sir.
Q. Do you know whether or not since this time Mr. David Evans has paid the whole of this tax?
106 A. I know that he has not paid a dollar of it. I have paid it under protest since then. I have a deed of the property from Mr. Evans and Mr. Peery.
Q. Is it not a fact that Mr. Evans has paid all the taxes assessed to him in that district, or do you know?
A. My best recollection is that Mr. Evans has never paid a dollar of paving tax in district No. 2, and that all the taxes that have been paid were paid by me under protest to keep my property from being sold.

Q. You have got the property?

A. I still have it.

Q. Did you have any conversation with Mr. Evans in regard to this protest and the right to sign his name at the time you signed it?

A. No. On the same day that it was signed Mr. Evans wanted to know who signed his name to it. He said whoever signed it he wanted to get to take it off—to go and take it off. He expressed himself as being in favor of paving; said Mr. Peery and I had no right to sign; but in a week afterwards Mr. Evans saw a great light and changed and applauded Mr. Peery and me for doing him a kindness.

Q. What was the amount when Mr. Peery withdrew the property that you and he and Mr. Evans were interested in?

A. He did not withdraw this Chapman House property, not a foot of it. I expressly told him——

Q. What do you know about the filing of this protest? You say that you were with Mr. Peery at the time?

A. Yes, sir.

Q. You don't know, as a matter of fact, it was 10 or 11?

A. I know it was before.

Q. Did you not say a moment ago that you were uncertain as to the hour?

A. Yes, sir; I said I was uncertain as to the hour, and I knew about it. I knew it was before 10 o'clock.

Mr. WHIPPLE: The defendant now moves to strike out all of the testimony of this witness, except as to the filing of the protest, for the reason that an attorney cannot sign for his client, nor can
107 one tenant in common sign for others.

Motion denied.

Redirect:

Q. Mr. Rogers, if your recollection was refreshed in regard to that *that* protest, do you think that you would have any recollection in regard to it?

A. Yes, sir.

Q. Now I will read it.

COURT: I suppose that you will concede that the one Brother Zane has is the same that Mr. Rogers read to Mr. Peery?

Mr. WHIPPLE: I suppose so.

Q. Is your recollection the same as Mr. Peery's in regard to the writing of that protest?

A. Yes, sir.

Mr. WHIPPLE: I object to that. That is not sufficient to lay the foundation. I understand they are doing that.

COURT: No; they were not laying the foundation for the purpose of offering it.

GEO. W. KERR, a witness on behalf of the plaintiff, being first duly sworn and examined in chief by Mr. Rogers, testified as follows:

Q. Mr. Kerr, were you the guardian of the person and estate of John Nichols, Gomer Nichols, Jane A. Nichols, Rose Nichols, and Leslie Nichols?
A. Yes, sir.
Q. Were you such guardian of the person and estate in March, 1892?
A. Yes, sir.
Q. And have been ever since?
A. Yes, sir.
Q. Appointed by the probate court of this county to act as such guardian?
A. Yes, sir.

108 (Mr. ROGERS: We have the papers here, but council makes no objection to this proof.)

Q. I will ask you if in March, 1892, you, as guardian of the person and estate of these minors, signed a protest against the paving of 25th street, between the west line of Wall avenue and the west line of Washington avenue, for 132 feet frontage of 25th street?
A. Yes, sir.
Q. And is that the protest which had the name of D. H. Peery at the head of it?
A. I could not say; I do not recollect of that.
Q. Do you remember the names that were upon the protest?
A. No, sir; I do not.
Q. Who had the protest?
A. I could not say that at present. I cannot remember who had the protest.
Q. Well, I will ask you if it was the same protest that was being circulated down on 25th street among the property-owners there that you signed?
A. Yes, sir.

Mr. WHIPPLE: I object as immaterial and incompetent.
COURT: I think that it may go in for what it is worth. The strength of it will be considered afterwards.

Q. You say it was?
A. Yes, sir.

Cross-examined by Mr. WHIPPLE:

Q. What do you say that you were, administrator or——
A. Guardian.
Q. Guardian of the minor heirs of the Nichols estate?
A. Yes, sir.
Q. Do you know whether you obtained any authority from the probate court to sign a protest?

Council for plaintiff- objected to that as a matter of law for the court to pass upon from an inspection of the papers.

109 COURT: You may ask him if he got any authority.

Mr. WHIPPLE: Did you get any authority from any court to sign this protest?

A. No, sir,

Q. You simply signed it as guardian of the heirs?

A. I signed by permission of the children.

Mr. WHIPPLE: The defendant now objects to the testimony of this witness and moves to strike it out, because it is incompetent and immaterial.

Motion denied.

Mr. JAMES E. HORROCKS, called for the plaintiff- and duly sworn, testified in chief, examined by Mr. Rogers, as follows:

Q. Are you J. E. Horrocks?

A. Yes, sir.

Q. The same Horrocks mentioned by Mr. De Voto as owning property on 25th street?

A. Yes, sir.

Q. I will ask you if in March, 1892, you signed a protest against paving of 25th street.

A. Yes, sir.

Q. In alleged paving district No. 2?

A. Yes, sir.

Q. What name did you sign?

A. James E. Horrocks and Ann Horrocks.

Q. J. E. and Ann Horrocks?

A. Yes, sir.

Q. Who was Ann Horrocks?

A. My mother.

Q. What, if any, authority did you have to sign for her?

A. A power of attorney.

Q. Have you got it here?

A. I have got it in my safe at home.

Q. I wish you could produce that power of attorney.

A. It is on record in the county court.

Mr. WHIPPLE: I object unless the power of attorney is produced.

COURT: It may stand for the present, and if they do not produce it, it goes out.

Q. You signed the name of yourself and mother, Ann Horrocks, for all the property which you had frontage on 25th street, in that alleged district?

A. Sixty-five feet.

110 COURT: Sixty-five feet between you?

A. Yes, sir; undivided one-half.

Q. Did you sign the name of John Horr-cks?

A. No.

Q. Did he sign?
A. No. That there is an estate settled by the court, an undivided one-third—James Horrocks, Ann Horrocks, and Claud Benton Horrocks.
Q. How many feet did you sign for yourself and mother?
A. Signed for 26 feet.
Q. You just stated you signed for 65 feet.
A. Well, I know I signed for 65 feet. That is another piece.
Q. You signed for one piece 65 feet?
A. Yes, sir.
Q. How much was the other that you signed for?
A. 26 feet. That is two-thirds of 39, ain't it?

Cross-examination:

Q. Did you sign more than once?
A. Not that I remember; only over to the city hall.
Q. When was that?
A. Why, at the time the protest was put in—that is, in regards to when I paid the first assessment under protest.
Q. You never signed any other time? Is that the protest you have been talking about when you paid this assessment under protest?
A. No, sir.
Q. What protest have you been talking about?
A. I am talking about the protests of paving 25th street at that time.
Q. When did you sign such protest as that?
A. As near as I can recollect, it was about 1892.
Q. What time in 1892?
A. Some time in March or April, I forget which.
Q. Which do you think it was?
A. I suppose it would be in March.
Q. Are you sure that it was in March?
111 A. I cannot tell for certain. I cannot recollect the time.
Q. What do you think about it?
A. I think it was in March.
Q. It may have been in April?
A. Could not say.
Q. You won't say that it wasn't?
A. No.
Q. How many times did you sign?
A. Once, I believe.
Q. Did you sign more than one petition?
A. That is all that I know of.
Q. You signed J. E. and Ann Horrocks?
A. That is all.
Q. That is yourself and your mother?
A. Yes, sir.
Q. In whose name did the land stand, if you know?
A. It was in my mother's and my name.

Q. Was it in your name at that time?
A. Yes, sir.
Q. Did you talk with your mother about signing it before you did sign it?
A. No, sir.
Q. She did not tell you to sign it?
A. No, sir.
Q. You signed it of your own free will, without any written or verbal authority from her?
A. Yes, sir.
Q. How many feet did you say you signed for?
A. There is 26 feet and 65 feet.
Q. How many feet would that be?
A. 91. I signed for 104 on that protest—that is, when I protested paying, when I paid the money.
Q. We are not talking about that, Mr. Horrocks; we are just talking about the protests of paving that were filed after the notice of intention was published.
A. I could not sign for the guardian at Salt Lake: she——
Q. You could not sign for her; you had no authority?
A. No, sir.

Mr. WHIPPLE: Now, then, the defendant moves to strike out the testimony of this witness so far as it purports to bind Ann Horrocks, for the reason that one tenant cannot sign a petition for co-tenant.

112 COURT: He says he has written power of attorney of record.

Q. This protest that you signed was the one that had the name of D. H. Peery on?
A I did not notice what was the heading. I looked over——
Q. What names do you recollect of seeing on it?
A. I saw Stephens Bros. and several others.
Q. State what other names you remember of seeing on this protest.
A. Thompson, he was there. I believe that is all I recollect—know about.
Q. How about Clark, Spargo, and Chapman?
A. I did not notice them.
Q. I will ask you if you afterwards told your mother about doing this?
A. Yes, sir.
Q. What, if anything, did she do in regard to it, as to approving or ratifying it or disapproving it?
A. She approved of my action. She said what fools they were to pave anyhow.

Mr. WHIPPLE: I move to strike that out.
COURT: Yes; that may go out, her expression of opinion.

Q. What names did you see on the protest you signed?
A. I saw a couple of *of* Stephens Bros. and Thompson; that is all. I remember James E. Thompson.

Q. You do not know whether *that was* these names were on the protest that was filed or not, do you?
A. I could not tell whether——

Mr. WHIPPLE: I move to strike that out for the reason that it is incompetent and immaterial.
COURT: I think that may stand.

Q. Let us see if we have got that right. What protest did you sign, Mr. Horrocks?
A. A protest against paving of 25th street with that kind of pavement, because I had already signed for the paving of the 25th street.
113 Q. Mecadam?
A. Yes, sir.
Q. Now, then, do you know whether the protest you signed was ever filed?
A. I do not know whether it was or not.
Q. With the recorder?
A. No, sir; I do not.
Q. You do not know whether it ever came to the attention of the city council, do you?
A. It may have done. I do know of it, sir.
Q. Do you know whether or not there was more than one protest circulated?
A. I do not know.
Q. You do not know whether there was or not?
A. No, sir.

Mr. WHIPPLE: I insist on the objection that it is incompetent.
Objection overruled.

A recess was here had until 2 o'clock p. m.

OCT. 2ND, 1894—2 o'clock p. m.

Mr. WHIPPLE: The defendant now further objects to the testimony of D. H. Peery, Jr., L. R. Rogers, and Geo. W. Kerr, and asks to strike out, for the reason that it is not shown that they were agents of any property.
Motion was denied.

JAMES HORROCKS, recalled by Mr. Rogers, testified as follows:

Q. Mr. Horrocks, this is the power of attorney you testified concerning in your examination this morning?
A. Yes, sir.
Q. Is that the signature of your mother, Ann Horrocks?
A. Yes, sir.

Mr. WHIPPLE: I am inclined to think it is sufficient.
COURT: Let it appear that it is dated May 15th, 1891.
It was conceded that the witness had the power of attorney from his mother.

Mr. WHIPPLE (to witness): Has your power of attorney
114 been revoked?

A. No, sir.

CHARLES R. REED, a witness on behalf of the plaintiffs, being duly sworn and examined in chief by Mr. Rogers, testified as follows:

Q. Your name is Charles Reid?

A. Yes, sir.

Q. Are you the same Charles Reid who, with C. Fitzgerald, was the owner of the property on 25th street between the west line of Grant avenue and the west line of Washington avenue in March, 1892?

A. Yes, sir.

Q. I will ask if you——

A. Between Wall avenue and Lincoln.

Q. That would be between Wall and Washington?

A. Yes, sir.

Q. I asked if you signed a protest against the paving of that street March 22nd, 1892, for yourself and Fitzgerald?

A. Yes, sir.

Q. What, if any, authority did you have from Mr. Fitzgerald to sign it?

A. He asked me to sign any papers that were gotten up to prevent the paving of the street.

Q. Is that the same protest that has been testified to?

A. Mr. Chapman had it down to the hotels and all the property-owners signed it.

Q. Is it the same protest that was testified about this morning?

A. I understand that it was the same protest.

Cross-examination:

Q. How do you know that it is the same protest, Mr. Reid?

A. It is a protest that all the property-owners signed.

Q. Do you know that all signed them?

A. Well, the majority, I understand, signed them.

Q. Do you know who did?

A. I saw quite a number of names.

Q. Do you know that the protest you signed was ever filed with the recorder?

115 A. I understood it was. Mr. Chapman said——

Q. Do you know personally? No matter what Mr. Chapman said.

A. Only what he told me.

Q. You do not know but what there were several protests circulated?

A. There would not be to my——

Q. You do not know positively whether there was or not?

A. No, sir.

Q. Now, you do not know in fact that the protest you signed ever reached the city recorder's office, do you?

A. Mr. Chapman said——
Q. Did you see it?
A. No; I did not see it.
Q. Was you with anybody when it was filed?
A. No, sir.
Q. You do not know, then, that it was in fact filed, except that Mr. Chapman told you?
A. Yes, sir.
Q. You only know——
A. Only know what he told me.

Mr. WHITTLE: I move to strike out the testimony.
Motion was denied.

Redirect:

Q. This protest you signed had the signature of a number of names on it?
A. Yes, sir.
Q. Would you remember, then, the names if your attention was called to —?
A. I can recall it.
Q. I will ask you if you remember the name of D. H. Peery being at the head of the protest you signed and Stephens Bros. being on them.
A. I remember them parties were on.
Q. How about Wells and Sargo and John Broom and William Chapman?
A. Yes; and Mr. Murphy.
Q. Geo. W. Murphy?
A. Yes, sir.
Q. They were all on the same paper that you signed?
A. And Mr. Beil.
Q. All signed by these gentlemen?
116 A. Yes, sir.
Q. How about Horrocks—do you remember seeing their names on there, signed by them?
A. If I remember right, his name was on it, but I did not sign it until towards the last.
Q. Joseph Clark; was his name signed by him?
A. I am quite positive his name was *was* on it.
Q. Do you remember about John Maguire?
A. I don't remember about John Maguire's.
Q. Do you remember about Scudder and Carlson's?
A. Well, it is so long ago I cannot remember all of them.
Q. Do you remember about Mary E. Fitzgerald, whether her name was signed by her?
A. I do not remember.
Q. Do you remember about J. M. Major's name being on it, signed by him?
A. I do not remember his name.
Q. Krauch and Lashus——

A. I think I remember Kraush's.
Q. How as to Lashus?
A. I think his name was on it, if I remember right.
Q. How as to McKee, Rebecca W. McKee and Caleb L. McKee?
A. I do not remember; I just gleaned over them, and them that I was personally acquainted with I remember.
Q. How as to Joseph Morely; do you remember of his name being signed by himself?
A. I do not remember.

Recross:

Q. What part of this property do you own, Mr. Reid?
A. Why, it is a part of that vacant lot on the corner.
Q. What part of the lot do you own, half of it or a third of it?
A. I think it is a little over a third of that lot.
Q. Who owns the other third?
A. Connelly, I think; I would not be sure*a*.
Q. Who owned it on March 29th, 1892?

117 Mr. ROGERS: We object to it. It is admitted who*m* owned this property.

Mr. WHIPPLE: This evidence is not to contradict that, but to show the witness is mistaken.

Q. You say you owned one-third; who owned the two-thirds?
A. I won't be sure who owned the other. I could not swear who owned the other*e*.
Q. Who signed the protest?
A. For the other part?
Q. Yes.
A. Well, I do not remember.
Q. How much did you sign for?
A. I signed for 45 feet and nine inches.
Q. What portion of it, how much frontage; what is the whole frontage of that lot?
A. I won't be sure.
Q. What was the portion you owned, forty-five feet?
A. That is what we owned, Mr. Fitzgerald and I.
Q. You did not sign Mr. Fitzgerald's name, did you?

Mr. Rogers asked to amend the complaint to show that it was signed by Charles Reed and Fitzgerald, both, according to proof.

COURT: Do you object to the amendment?

Mr. WHIPPLE: Yes, your honor; I think this comes rather late at this time.

COURT: I do not think that this would prejudice you any. I think the amendment ought to be allowed.

Mr. WHIPPLE: Objection.

Mr. ROGERS: May it please your honor, we ask to amend the complaint, in the name of D. M. Stephens, striking out the initial M. and inserting H. It is typographical error. We also ask to insert the name of Ann Horrocks with the name of James E. Hor-

rocks, in accordance with the proof. We also ask leave to change the name of A. J. Morrison to the name of J. A. Morrison, another typographical error. We also ask leave to change the name of M. J. Warner to M. A. Warner, which is true of the party.

118 Mr. WHIPPLE: The defendant objects to each and every amendment proposed, for the reason that they work a surprise to the defense; that we were not notified that any such persons were presumed to have protested that were not shown by the complaint or by any of the records in this case, and we are not prepared to meet it.

COURT: The court will permit the amendments. I do not see that the defendant can suffer by reason of it.

Q. Now, do you say that you signed Mr. Fitzgerald's name to the protest?

A. I do not remember positively whether I signed his name or mine alone, but I signed for the full amount. He requested me to sign any paper gotten up against the paving of the street.

Q. But you are not certain that you signed his name?

A. I am not positive, but I always—I was under the impression——

Q. But you do not know whether you did or not, in fact?

A. I am not positive.

Mr. WHIPPLE: Now, I move to strike out the name of Fitzgerald, because if he was delegated with power he did not exercise the power, and consequently there was never any protest in regard to Mr. Fitzgerald.

Motion was denied.

The defendant then moved to strike out the evidence of the witness, which motion was denied.

MARK LINDSEY, a witness called on behalf of the plaintiff, being duly sworn, testified in chief as follows, being examined by Mr. Rogers:

Q. Your name is Mark Lindsey?

A. Yes, sir.

Q. How long have you lived in Ogden?

A. 16 years.

Q. Do you know Emma Munns?

A. I do.

Q. What relation does she sustain to you?

A. She is my wife.

Q. I will ask you if you saw her sign the protest in the

119 name of Emma Munns.

A. I did.

Q. At that time what was her name?

A. Her name was Emma Munns at that time.

Q. Mr. Lindsey, I will ask you if it is not a fact that some time in the distant future if Emma Munns was not a plural wife of yours.

A. Yes, sir.

Q. And subsequently your legal wife obtained a divorce from you?
A. Yes, sir.
Q. And you thereupon married Emma Munns, making her your legal wife?
A. Yes, sir.
Q. And Emma Munns and Emma Munns Lindsey are identically one and the same person?
A. Yes, sir.
Q. And at this time she was the Emma Munns Lindsey that was owning property on 25th street?
A. Yes, sir.

Cross-examination:

Q. Do you know what protest it was she signed?
A. I do, sir.
Q. How do you know?
A. Because I read it and she read it herself.
Q. Did you see it filed with the city recorder?
A. I do not know that I saw it filed.
Q. How do you know that it is this protest?
A. From the fact we signed no other.
Q. Well, there may have been others, may there not?
A. No, sir; no others presented to me.
Q. Do you know that there was no others presented to somebody else?
A. No, sir.
Q. Then you mean that you do not know?
A. Of course, I do not know that there were no others.
Q. There may have been half a dozen others circulated around the street and you not know of it?
120 A. I do not think there could.
Q. Could there not be another one?
A. I do not think so.
Q. For what reason?
A. From the fact that no one else would be interested in the property.
Q. In which?
A. In Emma Munns'.
Q. Are you sure there was no other petition circulated except the one you signed?
A. Yes, sir.
Q. How do you know?
A. From the fact that it was not presented to me.
Q. How do you know that there was none presented to anybody else besides you?
A. Not likely; I do not think.
Q. Do you know there was not?
A. Yes, sir.
Q. How do you know?
A. From the fact that it was not presented to me and we were

property-owners, and surely it would have been presented to us if——

Q. Suppose there had been three petitions and you had signed one and there were two others, did you sign them all?

A. No, sir; I signed one and my wife signed the other one.

Q. You did not see the others that were being circulated?

A. I do not think there was any.

Q. Do you know there is none?

A. I certainly could not swear there was, but I would suppose that it would have been presented to us.

Mr. WHIPPLE: We move to strike out the evidence of the witness because he has not shown himself competent.

Motion was denied.

Mr. WHIPPLE: We except.

SAM. CHAPMAN, a witness called in behalf of the plaintiffs, being first duly sworn and examined in chief by Mr. Zane, testified as follows:

121 Q. What is your full name?

A. Samuel Chapman.

Q. Where do you live, Mr. Chapman?

A. Ogden.

Q. How long have you lived here?

A. Since '85.

Q. Do you know this 25th street?

A. Yes, sir.

Q. Where the paving was being done a couple of years ago?

A. Yes, sir.

Q. Do you remember of a protest that was being signed by the property-owners on that street and presented to the city council?

A. Yes, sir.

Q. Along about March, 1892?

A. Yes, sir.

Q. Did you ever see that protest?

A. I seen part of it.

Q. In whose hand was the protest when you saw it?

A. It was in my brother's, W. N. Chapman.

Q. Was he a property-owner on 25th street?

A. Yes, sir.

Q. Do you know whether or not he signed that protest?

A. Yes, sir.

Q. Do you know whether or did you examine the names of any other parties signing the protest?

A. I looked it over.

Q. Did you notice whether D. H. Peery's name headed the protest?

A. I could not remember.

Q. Do you remember his name on the protest?

A. I remember of hearing his name was on it.

Q. Do you remember S. C. and W. J. Stephens?

A. I remember of their being on it.
Q. Do you remember of D. M. Stephens being on the protest?
A. Yes, sir.
Q. Do you remember S. C. Stephens?
A. Well, I could not distinguish the Stephens, but I know there were three; I think it was three.
Q. Do you remember John Pincock?
A. No; I do not.
Q. Do you remember Rebecca McKee?
A. Not Rebec-a.
Q. Caleb McKee.
A. I remember Caleb McKee.

122 Mr. WHIPPLE: Is this evidence to prove that their names were upon it or simply to show this protest?
Mr. ZANE: We are showing there was a protest.

Q. Do you remember R. A. Wells' names on the protest?
—. No; I do not.
Q. Do you remember Joseph Morley?
A. I was particularly on the lower block between Wall and Lincoln; above that I could not testify about; that is all.
Q. Do you remember Mr. Lashus—Geo. W. Lashus?
A. I do.
Q. Did he sign the protest?
A. His name appeared upon it.
Q. J. M. Major?
A. I think Major's was the Butterworth.
Q. Was his name upon it, J. M. Major?
A. J. M. Major's name was on it.
Q. Was any other name?
A. With Mrs. Butterworth's?
Q. With Butterworth's.
A. Wm. Butterworth's.
Q. Do you remember Mathias Biel?
A. Yes, sir.
Q. Do you remember Geo. W. Murphy?
A. Yes, sir.
Q. Do you remember Clark, Thompson, and Emmet?
A. Yes; as near as I can remember, there were some 65 feet under the name Clark and Petterson. I think Cla*kr* and Patterson.
Q. Clark and Patterson you remember?
A. Yes; as near as I remember.
Q. Do you remember Scutter and Carlson?
A. I remember Scutter and Carlson.
Q. J. H. Gardon?
A. J. H. Gardon; yes, sir.
Q. J. C. Armstrong?
A. J. C. Armstrong.
Q. Boyle and Patterson?

A. No; I remember Patterson's name being on it, but I could not say about Boyle and Patterson.

Q. Mary E. Fitzgerald; do you remember her name on the protest?

A. Her name was on the protest.

Q. Do you know whether it was signed by her or not?

123 A. I think it was signed by her individually, to the best of my recollection.

Q. Do you remember J. A. Morrison, on the protest signed there?

A. I remember his name, J. A. J., or which is it?

Q. Well, the initial I supposed——

Q. Did you see John Broom's name on the protest signed by him?

A. Broom's name appeared on the protest, according to what I was told at the time.

Mr. WHIPPLE: What is that?

The COURT: That last can go out.

Cross-examination:

Q. Where was it you saw Mr. William Chapman's name?

A. I saw it on the protest.

Q. What protest, Mr. Chapman?

A. Protest against paving.

Q. What time was this of the year?

A. It was along the latter part of March.

Q. The last day of March?

A. No, sir; it was not the last day.

Q. About what time in March?

A. Well, it was the day that the council—the last meeting that the council was to hold in March—the last regular meeting.

Q. What time of day was it; do you remember?

A. They held their regular meeting in the night.

Q. And this was some time during the day, was it?

A. Yes; this was some time during the day or the next day.

Q. Was it is the middle of the day?

A. When I saw the protest it was in the morning.

Q. What time in the morning; do you remember?

A. Well, I should judge it was between 8 and 9 o'clock.

Q. Did you see the other protests that was being circulated in the street?

A. No, sir.

Q. You did not see the other one?

A. No, sir.

124 Q. You did not see the other one?

A. No, sir.

Q. You did not see his name on the other protest, did you?

A. No, sir.

Q. Well, do you know where the other one was circulated?

A. I do not know anything about any other one.

Q. There may have been another one?

A. There may have been, for all I know.

Q. Do you know whether this protest was filed with the city recorder?

A. I know that the petition—that it was taken up to the recorder's office.

Q. How do you know?

A. Because——

Q. Because why?

A. I was told that it was carried there by me brother, who signed the petition.

Q. He carried it there and had it filed, did he? Did he tell you that he had it filed?

A. Said he presented it.

Q. Is that all you know about it, what your brother told you?

A. He did not present it individually alone, but he was with others.

Q. Who did he *ask* he was with?

A. I do not remember. He left my place—left our place down there in company with John Broom.

Q. Did he tell you that John Broom went with him to the city recorder's office?

A. They started from the house to go up there and present it to the city recorder.

Q. Did he afterwards tell you that John Broom went with him to the city recorder's and assisted in having it presented?

A. No; he did not.

Q. Did you say you saw your brother sign this protest?

A. I did not see him sign it. I seen his signature, and I can testify to his signature on the document at the time.

125 Q. All you know about its being filed is that your brother told you that he went to the city recorder and had it filed?

A. That is all I know.

Mr. WHIPPLE: I move to strike out the evidence of this witness because it is not shown that the name of his brother was on the protest in fact—that is, that he protested.

COURT: The only part of it the court thinks is hearsay was what you elicited yourself, Mr. Whipple. I think the motion will be denied.

J. H. CARDON, a witness called on behalf of the plaintiff, duly sworn and examined in chief by Mr. Rogers, testified as follows:

Q. Mr. Cardon, on March, 1892, were you the owner of property on 25th street between Wall and Lincoln avenues?

A. Yes, sir.

Q. Did you sign a protest against the paving of 25th street?

A. Yes, sir.

Q. At that time how many feet did you sign for?

A. 47 in all.

Q. How many feet were you in possession of and claimed to be the owner of at that time?

A. 47.44 feet and 3 feet surplus.

Q. Were you in possession of the surplus feet?

A. Yes, sir.

Q. That was the protest that had the name of D. H. Peery at the head of it, was it?

A. I think it was.

Q. Now, then, it has been some time ago. I would like to ask you if you could give us your best recollection as to whether or not you saw the signature of Caleb L. McKee on that protest that you signed.

A. Well, I saw quite a number of names, and my impression is that I saw Mr. McKee's signature on it.

Q. You knew his signature?

A. Yes, sir.

Q. You had done business with him?

A. Yes, sir.

Q. That is your best recollection?

A. Yes, sir.

Q. Now, as to Rebecca W. McKee. Did you see her signature?

A. I am not positive as to that.

126 Q. Give us your best recollection.

A. Well, really I do not think I did.

Q. You do not remember?

A. I do not remember; I may have saw it, but I do not remember.

Cross-examination:

Q. How do you know that this oprotest is the one that was filed with the county recorder?

Mr. ZANE: We object. There is no evidence that we have claimed that we filed it with the county recorder.

Mr. WHIPPLE: With the city recorder I mean. How do you know that this is the protest that was filed with the city recorder?

A. I did not see the protest filed, but I saw the men who presented it to me and others to sign the petition; said it was presented, and I also read the proceedings of the council where it had been presented.

Q. You know that it was the same one that was presented absolutely that you signed?

A. Well, the words in the petition, as I remember—the substance of the proceedings were reported in the proceedings of the council.

Q. That is, it was one that sounded like the one that you read and signed?

A. Yes, sir; I didn't see the identical petition presented.

Q. You could not, in fact, swear that it was absolutely presented?

A. Well, it was the petition of Armstrong——

Q. You cannot absolutely swear that this identical one that you signed was presented?

A. Not in those words; no.

Q. Now, then, do you say that you saw Caleb L. McKee's name on there?

A. To the best of my recollection, I did.

Q. You do not know whether he wrote it or some one else wrote it, do you?

A. I am familiar with his signature.

127 Q. Do you say positively that he wrote his name on that paper?

A. According to the best of me recollections he did.

Q. Well, do you say that he did?

Mr. ROGERS: Well, if the court please, I object to that.

COURT: I think, Mr. Whipple, that is permissable. He says it is to the best of his recollection.

Q. Do you say—what was his mother's name—you do not remember anything about whether her name was on the paper or not?

A. I would not swear it was on.

C. S. STEPHENS, examined by Mr. Rogers, after being first duly sworn, testified as follows:

Q. Mr. Stephens, in March, 1892, were you the owner of property on 25th street in this alleeged paving district?

A. Yes, sir.

Q. Did you sign a protest?

A. Yes, sir.

Q. State if you signed a protest headed by D. H. Peery.

A. Yes, sir.

Q. What name did you sign?

A. I signed S. C. Stephens, D. M. Stephens, J. C. Stephens, D. H. Stephens, and John Pincock.

Q. Did you sign the name of W. J. Stephens?

A. No; I did not sign that.

Q. What, if any, authority did you have from these persons at that time for signing their names to the protest?

A. They told me to do it.

Q. They were opposed to the paving?

A. They were opposed to the paving and knew that there was going to be a protest and told me to sign it for them.

Q. You signed it for the full frontage thay had?

A. Yes, sir.

Q. That was upon the protest headed D. H. Peery?

A. Yes, sir.

Q. When was that?

A. That was some time in the latter part of March.

Q. '92?

A. '82.

128 Cross-examination by Mr. WHIPPLE:

Q. How much frontage did S. C. Stephens have?

A. 21 feet and three-fourth- feet.

Counsel for plaintiff objected to that because it was admitted what they had; the plat showing the property owned had been received in evidence.

Mr. WHIPPLE: This is not for the purpose of contradicting that; it is simply to show what portion the tenants in common owned.

COURT: I do not think it is material, but the court will hear the proof.

Q. How many feet, Mr. Stephens?

A. 21.75.

Q. How much did D. M. and Co. —?

A. D. M. owned 35 feet; I think D. H. owned 33 and J. C. owned 20 or thereabouts and John Pincock owned 22, I think it was, and S. C. and W. J. together owned 65.

Q. What authority did you say you had—verbal?

A. Verbal authority.

Q. You did not have any written *a*authority?

A. No, sir; they were talking about getting up a protest, and I w*n*et to see these parties about it purposely for the protest, and they told me to sign their names against it, and we went to the bank and we were about the first. D. N. Peery signed it first and I signed the rest. W. J. signed and I signed these other names.

Q. Did you sign them all in one place in the protest?

A. Yes, sir; all together right at the head over the bank.

Q. In the same way?

A. Yes; right along there.

Mr. WHIPPLE: The defendant moves the court to strike out the testimony of S. C. Stephens for the reason that the plaintiff has not established an agency in S. C. Stephens for the other owners of the property.

Second. That tenants in common cannot sign for their
129 cotenants.

The motion was denied.

Redirect examination:

Q. I will ask if you saw H. J. Stephens sign.

A. Yes, sir.

Q. Signed the same written protest with you for the 65 feet?

A. Yes, sir.

R. A. WELLS, a witness on behalf of the *pa*lintiff-, first duly sworn, testified as follows:

Mr. ZANE:

Q. What is your full name?

A. Ranson Abner Wells.

Q. You reside at Ogden?

A. Yes, sir.

Q. In March, 1892, were you the owner of property on 25th street?

A. Yes, sir.

Q. Fron*gint* on the paving district?
A. Yes, sir.
Q. Did you ever sign a protest against paving in that district?
A. Yes, sir.
Q. Did you notice any of the names that were signed?
A. Oh, yes; I noticed that D. H. Peery was at the head.
Q. D. H. Peery was at the head?
A. Yes, sir.
Q. Do you remember about Rebecca McKee's name?
A. No, sir; I do not.
Q. Do you remember Cal*ed* L. McKee?
A. No, sir.

B. H. GODDARD, a witness called on behalf of the plaintiff-, duly sworn and examined in chief by Mr. Rogers, testified as follows:

Q. Mr. Goddard, — 1892, what, if any, position did you hold in *on* Quorum of Seventies, which owned real estate in 25th street, in this paving district No. 2?
A. Secretary and treasurer.
Q. At that time who was president?
A. William W. Fife.
Q. I will ask you if you signed a protest against paving of that street for the frontage of that property.
130 A. Yes, sir.
Q. You signed the Quorum of Seventies, by B. H. Goddard, secretary?
A. Yes, sir.
Q. What, if any, authority did you have?
A. I would state that we talked the matter over with the president, and it was his notion that we should protest, and when the petition was presented I signed it as stated; that when the tax notice was presented I refused to pay it; that at a subsequent — of the board of directors the action of the president and secretary in refusing to pay the tax was ratified.
Q. By whom?
A. By the board of directors.
Q. You have a board of directors?
A. Yes, sir.
Q. And the board of directors ratified your former action?
A. Yes, sir.

Mr. WHIPPLE: Now, I object to that, and move to strike out for the reason that the ratification came after the city council had acted.
COURT: On that ground the motion will be denied.
Mr. WHIPPLE: I move to strike out the evidence of the witness for the further reason that he has not shown any authority and has not established an agency for his principal.
COURT: Motion will be denied.

Cross-examination:

Q. Do you know that the petition you signed was the petition that you have heard afterwards was filed with the city recorder?
A. I understand that it was.
Q. Well, do you know whether it was or not, Mr. Coddard, of your own personal knowledge? Now, when you are testifying you are testifying to your own personal knowledge, and not——

Mr. ROGERS: We object to the lecturing of the witness.

Q. Now, do you know of your own personal knowledge
131 whether or not the paper you signed was afterwards filed with the city recorder?
A. I did not see it filed.
Q. Well, of your own personal knowledge you do not know whether it was filed or not?
A. I believe it was.
Q. Well, what of your own personal knowledge do you know? Answer yes or no.
A. No, sir; I cannot say that I do.

Redirect:

Q. To the best of your recollection, the same paper that you signed was filed?
A. I understood that it was.
Q. The peper you signed had the name of D. H. Peery at the head of it and was addressed to the common council of Ogden city?
A. Yes, sir.
Q. And was a protest against the paving of 25th street?
A. Yes, sir.
Q. Do you remember the names of other people signed to it?
A. I remember seeing the name- of Job Pingree, Joseph Clark, and George W. Lashus.
Q. You were acquainted with Pingree's signature?
A. Yes, sir.
Q. That was his signature on that peper?
A. Yes, sir.

GEO. W. MURPHY, a witness for the plaintiff, being first duly sworn, testified in chief as follows:

Q. Mr. Murphy, in March, 1892, were you a property-owner on 25th street, in this alleged paving district?
A. Yes, sir.
Q. State whether or not you signed a protest.
A. I did.
Q. For all the property which you owned?
A. Yes, sir.
Q. You owned two pieces of property in that district, did you?
A. Yes, sir.
Q. Do you remember the frontage of each on 25th street? If so, state it.

A. In different blocks?
Q. Yes, sir.
—. Block 25 was 21.50 feet; block 27, 107 feet.
132 Q. You signed for both of these, did you?
A. Yes, sir.
Q. This protest that you signed, was it the one that was afterwards presented to the city council?
A. Well, that is what I supposed that it was.
Q. It had the name of D. H. Peery at the head of it?
A. Yes, sir.
Q. And was addressed to the common council of Ogden city?
A. Yes, sir.
Q. And set up the fact that the property-owners protested?
—. Yes, sir.
Q. Now, you carried that petition around—that protest—in connection with Mr. Chapman and Mr. Broom, who have since died?
A. Yes, sir.
Q. I will ask you if you got Charles Fox to sign it just at the head of your name.
A. I could not say; that was not on the protion that I went over. I went on the lower block.
Q. You remember seeing his name on it?
A. Yes, sir.
Q. You knew Fox's signature?
A. Yes, sir.
Q. Had done business with him?
A. Yes, sir.
Q. Was that his signature?
A. Yes, sir.
Q. Do you know James Thompson?
—. There are two Thompsons. I do not know which you mean.
Q. Well, the one who owned a piece of property.
A. Yes, sir.
Q. Did you get him to sign?
A. No, sir.
Q. Do you know James L. Dee?
A. No; I did not go down that block.
Q. Rebecca W. McKee—she was in your block?
A. Yes, sir.
Q. Did she sign it?
A. I could not say positively as to her. I remember seeing C. I. McKee.
Q. What is your best recollection of Rebecca W. McKee being on there?
A. It is my best recollection that they were both on.
Q. J. M. Major—did he sign?
A. Yes; he signed for other parties.
133 Q. For himself and Mrs. Butterworth?
A. Yes, sir.
Q. Did you see him sign?
A. I heard him speak about signing it, saying that he would sign.

Q. But did you see his signature on the paper?
A. I saw his signature on the paper.
Q. You recognized it as being *your* signature?
A. Yes, sir.
Q. Mathias Biehl, you know him, Biehl, the butcher?
A. Yes, sir.
Q. Do you know his signature?
A. Yes, sir.
Q. Did you see his signature on the protest that you signed?
A. I saw his signature on it.
Q. Scudder and Calrson—you know them?
A. Yes, sir.
Q. They were owners in the same block with you?
A. Yes, sir.
Q. Did you see their signature-?
A. Yes, sir.
Q. Was it on the protest, the same one which you signed?

Mr. WHIPPLE: I understand that this is simply to identify that the one that he signed was the one they all signed. Is it to show that these people protested, or that all these people signed the same paper?

Mr. ROGERS: It is for the purpose of showing that these people signed this protest.

Mr. WHIPPLE: That is all right.

Q. You saw their signatures on the protest, did you?
A. Yes, sir.
Q. Adam Patterson—did you see his?
A. I could not say as to that; that was under Chapman's portion.
Q. Mary E. Fitzgerald—did you see hers?
A. Yes, sir.
Q. Sorenson—did you see his?
A. No, sir.
Q. Did you know Liddie Wadman or Liddie Hanson?
A. I could not say as I do.
Q. Do you know M. A. Warner or Job Warnes's wife?
A. No, not personally.
Q. J. A. Morrison—that *it* the butcher, *it is* not?
A. Yes, sir.
134 Q. Do you know him?
A. Yes, sir.
Q. Do you know his signature?
A. Yes, sir.
Q. Did you see his signature on this protest that you signed?
A. Yes, sir; he went around with me to take it.

Cross-examination:

Q. You say that Mr. Morrison went around with you, Mr. Murphy?
A. Yes, sir.

Q. What did he go around with you for?
A. With the protest.
Q. Did you see him sign it?
A. It appears to me I did.
Q. Well, are you certain?
A. Well, I could not say as to seeing him sign it. I saw it on the protest and know about the time it was done.
Q. How do you know that he signed it?
A. I know his signature and he told me.
Q. He told you he signed it?
A. Yes, sir.
Q. How did you know his signature? What is there peculiar about his signature?
A. I have done business with him.
Q. Are you able to swear that you would know his signature anywhere you would see it?
A. Why, I would know it enough to satisfy myself.
Q. You do not know in fact that it may have been written by somebody else by his order, do you? Answer my question, Mr. Murphy, yes or not.
A. I say I know his signature.
Q. What do you know about Schudder & Carlson? Did you see them sign?
A. I saw it on the protest.
Q. How often have you seen this man Morrison's signature?
A. Well, I saw it very often. I did business with him two or three times a week.
Q. What is your business, Mr. Murphy?
A. Grocer.
135 Q. Are you an expert in the examination of handwriting?

Mr. ZANE: If your honor please, we object to that. A man who has seen this signature once can testify to it—not as an expert.
COURT: That is the rule.

Q. Do you know Scudder and Carlson's signature when you see it?
A. Well, yes; I could tell Schudder's & Carlson's signature.
Q. Could you tell Scudder's?
A. I do not know that — ever wrote it.
Q. Which one wrote this, Schudder or Carlson?
A. Carlson.
Q. How do you know Carlson wrote it?
A. I can tell his writing.
Q. How does he write—with a character "&" between Schudder and Carlson or "a-n-d"?
A. Well, I could not say how it was done then.
Q. How do you know, then, in fact, that it was Schudder and Carlson's signature if you do not know how it was done?
A. I saw it on the protest.
Q. Now, is it not a fact that you do not know absolutely that Schudder and Carlson signed the paper; that you only saw a name purporting to be theirs? Is not that the truth?

A. The name was there.

Q. That is all you know about it, isn't it, Mr. Murphy, in fact? In fact, that is all you know about it, isn't it?

A. Well, I understood in talking with them that they would sign it.

Q. That is the reason that you think they signed it, isn't it?

A. I had every reason to suppose they signed it.

Q. That is all the reason you have got, that they said they would sign it?

A. And seeing their signature there.

Q. I want to know how you know it was their signature?

A. I had done business with them and seen their signature.

Q. But you do not know they wrote it?

(No answer.)

Q. Now, then, you do not know that Major signed the paper that you referred to? Did you see him sign it?

A. I heard him say that he would sign it.

136 Q. That is the reason that you think he did?

A. I was in his presence at the time.

Q. When he said he would?

A. Yes, sir.

Q. That is the reason that you think that he signed it?

A. I have every reason to believe he signed it, because——

Q. That is the reason that you think he signed it?

A. Yes, sir.

Q. How do you know that Biehl signed it?

A. Biehl signed it in my presence.

Q. You saw him sign it, did you?

A. Yes, sir.

Q. Did you see Caleb McKee sign it?

A. I could not remember exactly.

Q. You do not remember whether Rebecca McKee signed it or not?

A. I saw the name on the protest.

Q. You do not know whether they signed them or not?

A. Well, I am familiar with Mr. McKee's writing enough to know.

Q. Are you familiar with Rebecca McKee's writing?

A. No, sir.

Q. You do not know whether she signed it or not?

A. I could not say as to that.

Mr. WHIPPLE: The defendant moves to strike out the testimony of Geo. W. Murphy, for the reason that so far as it affects the name of Caleb I. McKee, Rebecca McKee, Major Biehl, and Mrs. Fitzgerald——

COURT: You saw Mrs. Fitzgerald sign?

Q. Did you see Mrs. Fitzgerald sign?

WITNESS: I went there and she signed in my presence.

Mr. WHIPPLE (continuing): Schudder and Carlson and Morrison, for the reason that he has not shown himself competent to testify.

The motion was denied.

J. C. ARMSTRONG, a witness called on behalf of the plaintiff and duly sworn, testified in chief as follows:

Q. Mr. Armstrong, in March, 1892, what, if any, position
137 did you hold in the Commercial National bank of this city *National bank of this city?*

A. I was president.

Q. Who was cashier of that bank?

A. O. E. Hill.

Q. Did you know C. F. Taylor?

A. I did.

Q. Did you at that time?

A. Yes, sir.

Q. State whether or not he was a customer or patron of that bank.

A. He was.

Q. State whether or not O. E. Holl was his agent.

A. He was.

Q. Agent for what?

A. Attending to his business here.

Q. Attending to all his business here?

A. Yes, sir.

Cross-examination:

Q. How do you know that he was his agent, Mr. Armstrong?

A. I know from a statement that Mr. Hill made to me.

Mr. WHIPPLE: I move to strike out the testimony because you cannot prove an agency by the declaration of the agent.

COURT: I would like to know if Mr. Hill was acting as his agent.

A. He was.

Q. Did Mr. Taylor know that he was acting as his agent?

A. He did.

Mr. WHIPPLE: I move to strike that out because you cannot prove an agency that way.

Mr. ROGERS: I will ask you, Mr. Armstrong, if Mr. Hill had charge of Mr. Taylor's property.

A. He did; he had charge of it in this way, collecting rents and paying the expenses; bills that might be brought against the property.

Q. What as to taxes?

A. And taxes. He had full control of Mr. Taylor's property—well, up to a couple of years previous to the time that Hill went out of the bank from the time that he made that investment.

Q. Where was Mr. Taylor living?

A. He lived in San Francisco.

Q. Mr. Hill was transacting all of his business here?

A. Yes, sir; that is right.

138 Mr. WHIPPLE: How do you know this; by conversation with Mr. Hill?

A. No; not only by conversation with Mr. Hill, but by the business that was done in the bank.

Q. Done by Mr. Hill's writing; Mr. Hill's correspondence?

A. No; I had some correspondence with Mr. Taylor myself.

Q. What did Mr. Taylor say about it?

A. He stated to me in a letter he had written to me that Mr. Hill was the authorized agent to do his business.

Q. Did he say he was the authorized agent to handle this particular property?

A. Not in those words.

Q. Wasn't this particular property mentioned?

A. Oh, he stated in this way that Mr. Hill was his authorized agent to attend to his business.

Q. Well, did he say what the business was?

A. He did not.

Q. You do not know whether it was in reference to this land or not?

A. I do not.

Q. Then, in fact, you do not know that he was his agent as to this particular land?

A. I do.

Q. How do you know?

A. From the fact that he had no other land here; that was the only property he owned in the city.

Q. What business did he do through your bank?

A. He had a deposit there; quite a sum of money on deposit there.

Q. What did he do with it?

Mr. ROGERS: That is immaterial.

WITNESS: He used it in connection with his property in making repairs, and the rent from time to time as collected was deposited in the bank subject to Mr. Taylor's order.

Q. That is the only reason you think he was agent for this land?

A. Well, Mr. Taylor stated to me that Hill was agent for his——

Q. Business affairs?

A. For his property here.

Q. Agent for what?

A. Collecting the rents and paying the taxes, etc.

Q. He did not tell you that he instructed him to protest, did he?

139 A. No, sir; the question was never raised.

Mr. WHIPPLE: I move to strike out the evidence of the witness J. C. Armstrong for the reason that it does not in any way tend to establish an agency in O. E. Hill in connection with the property in question.

COURT: The motion will be denied.

Mr. ROGERS: The name of C. F. Taylor was signed by O. E. Hill?

A. Yes, sir.

Mr. WHIPPLE: I move to strike that out for the reason that an agent cannot protest for his principal.

Motion was denied.

JOSEPH CLARK, recalled for plaintiff- and examined in chief by Mr. Rogers, testified as follows:

Q. Mr. Clark, in March, 1892, were you the owner of property on 25th street, in this alleged paving district No. 2?

A. Yes, sir.

Q. I will ask you if at that time you were interested in circulating or signing a protest against the paving of that street.

A. Yes, sir.

Q. Did you sign a protest?

A. Yes, sir.

Q. State whether or not it was the protest that has been testified about this morning by Mr. Peery.

A. Yes, sir; I have every reason to believe it was the same one.

Q. What is your best judgment—that it is the same?

A. That it is so.

Q. It was addressed to the common council of Ogden city?

A. Yes, sir.

Q. And it was a protest against the paving there?

A. Yes, sir.

Q. Do you remember whose name was at the head of it?

A. Yes, sir; D. H. Peery.

140 Q. Do you remember the Stephens' names following along next?

A. Yes, sir.

Mr. WHIPPLE: That is a little leading.

Q. Did you sign for Clark, Emmet and Thompson?

A. Yes, sir.

Q. For all they owned?

Mr. WHIPPLE: That is leading.

Mr. ROGERS: I have got a right to lead where this instrument was lost by them. I will ask you, Mr. Clark, did you sign for these?

A. Yes, sir.

Q. What name?

A. Joseph Clark.

Q. Did you sign for anybody else?

A. I signed for Clark and Patterson.

Q. Anybody else?

A. Clark, Emmet and Thompson.

Q. Anybody else?

A. No, sir.

Q. Did you see Boyle and Patterson sign to that paper?

A. I could not say.

Q. James Thompson?

A. No, sir.

Mr. WHIPPLE: Ask him what names he did see.

COURT: I think it is proper. A man may not remember an instrument and yet, when his attention is called, may remember the name and something of its contents.

Q. H. A. Lewis—do you remember that name?
A. Yes, sir.
Q. You knew Mr. Lewis & had done business with him?
A. Yes, sir.
Q. Banking business and milling business. Mr. Lewis does business at your bank and you know his signature?
A. Yes, sir.
Q. And you saw his signature to this?
A. I saw his name. I could not swear—I would not—as to his signature.
Q. What is your best recollection about it?
A. That his name was on it.
141 Q. Signed by——
A. Hi. Lewis, as we usually call him.
Q. Signed by him?
A. Yes, sir.
Q. Now, as to either of the Watkins'. *A.* Did you see their signature?
A. I cannot say that I did.
Q. How as to William Driver?
A. I can say that I saw his signature when I put down mine.
Q. Did you see it there after?
A. No; I only saw the petition once.
Q. Now, as to H. I. Griffin?
A. I am sure that H. I. Griffin was down.
Q. Signed by whom?
A. By himself.
Q. How as to Willard Kay?
A. Willard Kay was down.
Q. Signed by whom?
A. By Willard Kay.
Q. How as to John Maguire?
A. I cannot say.
Q. How as to C. Sorenson?
A. I cannot say that, either.
Q. How as to Libbie Wadman?
A. I don't know the name Liddie.
Q. How as to M. A. Warner?
A. Well, I do not know.
Q. How as to Adam Patterson?
A. Well, I cannot say as to his signature being down at the time I signed. All I can state is he was going to protest.
Q. Did you ever see his signature thereafter?
A. No; as I said, I only saw the list once.
Q. How as to C. F. Krauch?
A. That I did not see.

Q. James I. Dee—did you see his signature?
A. No; I did not.

Cross-examination:

Q. Now, Mr. Clark, for whom did you say you signed—the first firm that you say you signed for?
A. I signed first for Joseph Clark.
Q. Alone?
A. Yes, sir.
142 Q. And now who next did you sign for?
A. I signed for Joseph Clark and Adam Patterson.
Q. Did you and Mr. Patterson own this land together at that time?
A. We owned fifty feet together.
Q. Each one-half?
A. No, sir; it was undivided.
Q. Each owned an undivided one-half?
A. Yes, sir.
Q. What other name did you sign?
A. I signed for Clark, Emmet and Thompson.
Q. How was this land owned?
A. I owned half and Emmet and Thompson owned the other half.
Q. You signed for Thompson and Emmet?
A. Yes, sir.
Q. Did you sign the words Clark, Emmit and Thompson, or each man individually?
A. Clark, Emmet and Thompson.
Q. How did you sign the others?
A. Clark and Patterson.
Q. Whose name did this land stand in?
A. Clark and Patterson.
Q. In whose name did the other stand in?
A. In Clark, Emmet and Thompson.
Q. How was the deeds? Was it Joseph Clark? Who was the other man? How was the deed? Was the deed made to Joseph Clark?
A. James K. Thompson.
Q. James I. Thompson?
A. And W. R. Emmet.
Q. How was the deed made to Clark and Patterson?
A. Joseph Clark and Adam Patterson.

Mr. WHIPPLE: Now, then, I move to strike out the testimony of this witness for the reason that the signature to this paper, which purports to be a protest and signed by Clark and Patterson, would not be notice of ownership to the city council unless the name of each owner was fully signed. I further move to strike out the testimony of this witness for the reason that the signature of Clark,
Emmet and Thompson would not be notice to the city
143 council unless signed by Joseph Clark, W. R. Emmett, and James I. Thompson.

COURT: Motion will be denied.

Mr. WHIPPLE: I further move to strike out the testimony of this witness, because one tenant or joint land-owner cannot sign a protest for the others.

Mr. ROGERS: Before that is passed on, I would like to ask the witnes- a couple of questions.

Q. What, if any, authority did you have at the time of signing this protest from Adam Patterson to sign his name?

A. Why, his permission; he told me to go ahead and do it; we consulted the matter between us, and he told me to sign his name.

Q. Also as to Clark, Emmet and Thompson; what, if any, authority did you have to sign their names?

A. The same authority; besides the doing of the business for Clark, Emmet and Thompson; collecting rents, signing Clark, Emmet & Thompson to rents, receipts, and so forth, paying all the bills charged to them in that way.

Mr. WHIPPLE: What is Mr. Patterson's name, did you say?

A. Adam Patterson.

Q. You did not sign it Adam Patterson?

A. No, sir; I signed it Patterson & Clark.

Q. You did not sign Mr. Emmet's name by his full name?

A. No, sir.

Q. Nor Mr. Thompson's name?

A. No, sir.

J. H. SPARGO, a witness for the plaintiff-, recalled by Mr. Rogers, testified in chief as follows:

Q. Mr. Spargo, in March, 1892, were you the owner of property on 25th street?

A. Yes, sir.

Q. On this alleged paving district?

A. Yes, sir.

Q. Were you interested in circulating a protest against the paving of that street?

144 A. Yes, sir.

Q. You circulated it?

A. I was one that circulated it.

Q. John Broom—did he sign?

A. Yes, sir.

Q. William Chapman?

A. Yes, sir.

Q. And both Messrs. Broom and Chapman are dead?

A. Yes, sir.

Q. When did they die—more than a year ago?

A. More than a year ago, yes, sir; I believe.

Q. You have read the description of the protest that Mr. Peery gave as having filed with the city recorder?

A. Yes, sir.

Q. I will ask you to state if that is the protest you helped to circulate, and did you sign it?

A. It is, to my best recollection.
Q. Did you sign it?
A. Yes, sir.
Q. Did you see Joseph Moreley sign it?
A. To the best of my recollection, I did.

Mr. WHIPPLE: I move to strike that out.
Mr. ROGERS: Why?
Mr. WHIPPLE: Because he says to the best of his recollection, he saw him sign it.
COURT: Motion will be denied.

Q. Lamoni Grix—did you see his?
A. To the best of my recollection, yes, sir.
Q. He signed it in your presence?
A. Yes, sir.
Q. James Thompson?
A. To the best of my recollection, he signed in my presence.
Q. James I. Dee?
A. Yes, sir; the same answer.
Q. Did he sign in your presence?
A. To the best of my recollection, yes, sir.
Q. J. C. Armstrong—did you see his signature on there?
A. I think I did.
Q. Harriet A. Lewis?
A. I think I saw her signature there.
Q. Boyle and Patterson or Adam Patterson?
A. Think I saw it there.

Mr. WHIPPLE: I insist that this — immaterial, what he thought about it.
145 Mr. ROGERS: It only goes to show the weight of his testimony.
Mr. WHIPPLE: We object to its going in.

Q. Mr. J. H. Watkins—do you know him?
A. Yes, sir.
Q. Did he sign it?
—. Yes, sir; he signed that paper.

COURT: You mean that it was his signature or that you simply think it was?
WITNESS: To the best of my recollection, I handed him the paper and he signed it in my presence.

Q. ' Sorenson—did he sign in your presence?
A. To the best of my recollection, he did.
Q. M. A. Warner—do you know her, Job Warner's wife?
A. Yes; I know her.
Q. Did she sign it?
A. Not in my presence.
Q. Do you know her signature?
A. No.

Q. Libbie Wadman—do you know her?
A. No, sir.
Q. John Maguire—did he sign in your presence?
A. I believe not.
Q. You know Uncle John's signature?
A. No; I do not know his signature.
Q. Rebecca W. McKee—did she sign it?
A. I do not know whether she signed it or not.
Q. You saw her name on it?
A. Yes, sir.
COURT: Was that her signature?
A. I do not know her signature.
Q. I. T. Griffin—did he sign it?
A. To the best of my recollection, he did.
Q. He helped to circulate it?
A. Yes, sir.

COURT: In your presence?
WITNESS: Yes, sir.

Q. William Driver?
A. I think William Driver signed it, but I am not sure.
Q. What is your best recollection that he did?
A. To the best of my recollection, he did.
146 Q. In your presence?
WITNESS: Yes, sir.
Q. Krauch?
A. I don't know as to Krauch, whether he did or not.
Q. All of this signing that you have testified to was done before this paper was presented to the recorder by Mr. Peery?
A. I do not know whether it was or not.
Q. Well, it was done before the paper left the hands of the protesters?
A. I believe that I left the papers with John Broom; I think that is the last I saw of them.

Cross-examination:

Q. How do you know that Mr. Morely signed this paper?
A. I believe I saw him sign it.
Q. Are you sure that you saw him sign it?
A. It is to the best of my recollection that he did sign it.
Q. It is only to your best recollection that you are testifying to about all of these signatures?

Mr. ZANE: I submit to your honor it certainly must be to his best recollection; it would not be to his worst.
COURT: You may proceed.

Q. Where was Mr. Grix when he signed it?
A. He was in his place of business.
Q. Were you with him?
A. I was.

Q. Which Thompson is it that you said signed it?
A. James Thompson.
Q. How many pieces of property did James Thompson have, if you know?
147 A. I think he only had one at that time.
Q. Didn't you hear Mr. Clark say that he signed for Mr. Thompson and Emmit together—Mr. James Thompson?
A. The chances are that it was not the same Thompson.
Q. Were there two Thompsons owning property on the street?
A. I do not know that there was.
Q. Were there two James Thompsons, if you know?
A. I do not know.
Q. Were you acquainted with but one?
A. Only one.
Q. Were you pretty well acquainted with the street?
A. Fairly well.
Q. Were you well acquainted with the property-owners?
A. Fairly well.
Q. You think you knew them all?
A. I did not know them all.
Q. You knew part of them, did you?
A. Yes, sir.
Q. Do you say that you circulated this paper?
A. I went with it some of the time, and Mr. Broom took it some of the time.
Q. How much of the time did you take it?
A. I think I took in every one—all of block 25.
Q. Did you circulate it upon other blocks?
A. No.
Q. Now, then, if any of these signatures appear as owners in other blocks you are mistaken as to the signatures as to seeing them signed?
A. I hardly think so, and for this reason——
Q. If that is true, then *are you* mistaken, are you?
A. These signatures were on the paper when I got it.
Q. These signatures were on the paper when you got them?
A. At least some of them were.
Q. Then you did not in fact see them sign if that is true?
A. I did not see those in the lower block sign.
Q. Did you see Mr. James I. Dee sign?
A. I did, to the best of my recollection.
Q. What block was he in?
A. Block 25.
Q. Did you see Mr. H. A. Lewis sign?
A. I am not sure as to that.
148 Q. You do not know whether you did or not?
—. ——.
Q. How about Boyle and Patterson; did you see them sign?
A. No, sir.
Q. You do not know whether, in fact, they signed the paper or not, do you?

A. No more than that I think I saw their names on it.
Q. How about S. Sorenson; did he sign in your presence?
A. I think he did.
Q. Where is his property—what block?
A. Block 25.
Q. This is the block in which you circulated the paper?
A. Yes, sir.
Q. Did anybody else circulate the paper in that block?
A. I think John Broom got a few signatures, and I was with him most of the time.
Q. Was this paper al- together, or was it in two parts?
A. I think it was two or three—it might have been more—folios.
Q. Were they al- together, or did each one take one and go to each block?
A. They were together, to the best of my recollection.
Q. All fastened together, were they? Do you know whether or not the paper was in the same condition—that is, in regard to its being al- together—when Mr. Broom had it as when you had it?
A. I think it was. I kept it in my safe all the time it was in Mr. Broom's or my possession.
Q. Which one is block 25—the block in which the school-house is located?
A. No, sir; in which the Broom hotel is situated.
Q. You did not circulate it down on the other block?
A. No, sir.
Q. Where was it that H. I. Griffin signed it?
A. I think he signed it in my place of business, to the best of my recollection.
149 Q. Are you sure that he did not sign it in his own place of business?
A. I am not sure as to that.
Q. If he did, then you did not see him sign it?
A. I was there several times.
Q. How about William Driver?
A. I think it was in his store.
Q. You saw him sign it?
A. I think I did.
Q. You are not definite about it?
A. I am not definite about it.

Mr. WHIPPLE: The defendant moves to strike out all the evidence of the witness, Mr. Spargo, in reference to the names of Morely, Grix, Thompson, Dee, Lewis, Morrison, McKee, Griffin, Driver, and Krauch for the reason that he has not shown himself to be competent to testify.

COURT: He did not testify as to Krauch. The motion will be denied.

Mr. ROGERS: If your honor please, H. H. Peery testified to his father's name.

JOHN A. BOYLE, called on behalf of the plaintiff and duly sworn, testified as follows:

Direct examination by Mr. ROGERS:

Q. Mr. Boyle, in March, 1892, were you the owner with Adam Patterson of a piece of real estate on 25th street, in alleged paving district No. 2?

A. Yes, sir.

Q. I will ask you if at that time you signed the name of Boyle and Petterson to the protests against paving.

A. Mr. Rogers, according to the best of my recollection, I did.

Q. What, if any, authority from Mr. Patterson did you have?

A. Mr. Healey came to me at the bank and told—asked me whether I was in favor of it or not. I told him no. He said Mr. Patterson was away in California, I think it was, if I remember right, and as I was an owner he would like to have me take charge of it, and from his——

150 Mr. WHIPPLE: That is not competent. Coming from Healey, that is hearsay.

COURT: That is hearsay.

Q. You did sign the protest, according to your best recollection *tion?*

A. According to my best recollection, I did what I thought was necessary to do, but forgot what it was.

Q. It was the protest being circulated on 25th street?

A. Yes, sir.

Q. It was the one addressed to the common council and headed by D. H. Peery?

A. Yes, sir; as near as I can recollect.

Q. Afterwards did Mr. Patterson ratify it or disapprove of it?

A. He never disapproved it; whether he ratified it or not, he did not disapprove of it.

Q. At that time was Mr. Healey interested with you in the property?

A. That is my understanding; yes.

Cross-examination:

Q. Whom did you say owned this?

A. As near as I can remember, Patterson and Healey owned one-half of it, Mr. George Driver owned one-quarter, and I owned the other quarter.

Q. Mr. George Driver?

A. Or Driver and Son. I am not sure.

Q. How did it stand of record?

A. I think it was in Patterson's name individually; I think it is now.

Q. How do you say it stood of record, to the best of your knowledge, in the party that you stated?

A. Mr. Patterson.

Q. In that way or divided in that way?
A. I think when it was bought that the deed went straight to Mr. Patterson; that is my recollection.
Q. And you signed for all—that is, you signed for Patterson and Healey, Boyle and Patterson?
151 A. Yes, sir; to the best of my recollection, I did.

Mr. WHIPPLE: I submit that it is not competent and move to strike it out.
Mr. ROGERS: Before passing upon that, your honor, I wish to state that I propose to prove by Mr. Healey, as the next witness, that he and Mr. Patterson talked the matter over and agreed that they would protest, and that Mr. Patterson instructed him to see that Mr. Boyle did it, and that he went to Mr. Boyle and instructed Mr. Boyle to make the protest.
COURT: When the protest is filed with the name on it, it seems to me that that is enough to put the city council on inquiry. I do not think that they can proceed upon the assumption that these names are fictitious and have been placed there without authority.
Mr. WHIPPLE: I move to strike out the evidence of the witness, because he has not shown himself competent to sign for the owners of that property.
COURT: In view especially of what counsel say that the next witness will prove, the motion will be denied for the present.

PATRICK HEALEY, a witness called on behalf of the plaintiff and duly sworn, testified as follows:

Direct examination:

Q. Mr. Healey, what is your business?
A. I am in the sheep business.
Q. Who is your partner?
A. Adam Patterson.
Q. And how long have you and him been in partnership?
A. 15 years.
Q. Continuously?
A. Yes, sir.
Q. Were you interested with Adam Patterson and John A. Boyle in a piece of real estate on 25th street, in this alleged paving district, in March, 1892?
A. Yes, sir.
Q. I will ask you to state if Mr. Patterson requested you to advise Mr. Boyle to protest against the paving of that street.
152 A. We talked about protesting.

Mr. WHIPPLE: I object to that as leading. Ask him what he said.
COURT: Yes; state what he said.

Mr. WHIPPLE: What did Mr. Petterson say?
COURT: What, if anything, did he say about the protest, signing the paper?

A. We talked about protesting against their paving of that street. We could not afford to pay the taxes on paving it.

Q. What did he say about protesting? Did you and him agree upon——

A. About protesting. We said we would protest it.

Q. What, if anything, did you say to Mr. Boyle about it?

A. I told Mr. Boyle to protest it.

Q. For yourself and Patterson?

A. For myself and Patterson; yes, sir.

Q. In pursuance of this agreement and conversation between yourself and Mr. Patterson?

A. Yes, sir.

Cross-examination:

Q. Mr.—where was it this conversation occurred? Where did this occur, Mr. Healey? Where were you when you had this talk with Mr. Patterson?

A. I think it was in California.

Q. You were coming back, were you?

A. I think so.

Q. And he asked you to protest for him, did he?

A. We talked about protesting.

Q. And he wanted you to protest?

A. I believe so.

Q. Then you asked Mr. Boyle to do it for him?

A. Yes, sir.

Q. What did Mr. Patterson say to you about protesting—wanted you should go and protest?

A. I think so.

Q. Instead of doing it yourself you had Mr. Boyle do it?

A. I went off up to the herd and the protest was not out. I was going north and I told Mr. Clark out on the street to go on
153 and protest on our property on the north of 25th street, and also Mr. Boyle. I went over to the bank and met him on the bank steps and told him to protest.

Q. You did this as a result of the conversation with Mr. Patterson?

A. Yes, sir.

Mr. WHIPPLE: Now, then, I move to strike out, because an agent cannot delegate his authority.

WITNESS: I owned some of the property. I think I have a right to.

COURT: I think that is competent, and motion will be denied.

Mr. WHIPPLE: We want an objection for the record.

Mr. J. H. SPARGO recalled.

Direct examination:

Q. Mr. Spargo, upon this protest that you signed, did you see the signature of J. C. Armstrong?

A. To the best of my recollection, I did.

Q. Do you know where Mr. Armstrong was at the time this protest went *in?*

A. No, sir; I do not know where he was.

Q. Don't you know, in fact, that he was in California?

A. I do not know whether he was or not.

Q. Now, if it should turn out that he was in California, you would be mistaken, would you not?

A. He might have signed it and went to California afterwards.

Q. When was this protest gotten up? When did you circulate it?

A. I think it was in March, 1892, to the best of my recollection.

Q. Did you circulate it before or after the 18th of March?

A. At different times.

Mr. ROGERS: We want the counsel to produce the two letters written *my* Mr. Armstrong to Mayor Turner and the common council protesting against the paving of this property.

154 Mr. WHIPPLE: We will produce the letters, if we can find them, your honor, at the next session of the court. Now, I object to the testimony because Mr. Armstrong is here in court himself. They can put him on the stand.

Q. When was it this was circulated?

A. I think it was during the month of March.

Q. What time in March?

A. I could not tell; whatever it was, I was out until I was tired of walking the streets.

Q. You did not circulate it until there was a notice of intention to pave? It was not before that, was it?

A. I do not know as to that; there was different parties around asking if we were in favor of paving.

Q. Can you tell with reference to the time that the council were to sit to hear the objections? How long was it before that?

A. I could not tell within a few days or a week.

Q. Could you tell within a month?

A. It may have been the latter part of April, for all I know, or in March.

Q. You did not know that it was in the latter part of April, in fact?

A. It may have been; it was in the spring. I did not pay any attention to dates.

Mr. WHIPPLE: I object and insist that this witness' testimony is absolutely incompetent, and move to strike it out.

COURT: Motion will be denied.

P. HEALEY recalled and examined in chief by Mr. Zane:

Q. We will offer by the witness the testimony that after the protest was filed and after the day fixed for the filing of the protests and before the council acted on the same an additional protest was put in by Mr. Patterson and Healey, and will follow that up by the testimony in regard to two other property-owners on 25 street.

Mr. WHIPPLE: That will be objected to on the grounds that
155 the statute provides that in the notice the counsel shall set a time when they will hear objections, and if on or before that time proteste representing the owners of one-half of the frontage in feet shall not have been filed, then the council shall be deemed to have acquired jurisdiction.

Mr. ZANE: If your honor please, I understand that the objection made by the attorney for the defendant is this: That after the hearing day fixed for the filing of the protests that no further protests can be received. I understand that to be his position. We offer to show by this witness, and then follow it up by testimony in regard to Jennie A. Fisher and Mrs. Alice Forbes, that other property-owners, to wit, these filed protests after the time fixed for protesting, but before the council acted upon these protests already filed. If the objection is made of course we will not insist upon our testimony any further than to say we would like an exception to the ruling upon it.

COURT: For the present, I will sustain the objection.

Mr. ZANE: We will take an exception.

Mrs. MARY ANN WARNER, a witness called in behalf of plaintiff and examined in chief by Mr. Rogers, testified as follows:

Q. Mrs. Warner, in March, 1892, were you the owner of 54 feet frontage on 25th street, in this city?

A. Yes, sir.

Q. I will ask you to state if in March of that year you signed a protest against the paving of 25th street.

A. Yes, sir; I do not remember the day, but it was some time then.

Q. You signed for your property?

A. Yes, sir.

Cross-examination:

Q. Do you know what protest it was, Mrs. Warner?

A. Protest against paving.

Q. Do you know whether it was filed or not—the one you signed? Where did you sign it?

A. I signed it at home.

156 Q. By whom was it presented?

A. I cannot scarcely remember who it was, but I remember signing it quite well.

Q. You do not know but that there might have been three or four?

A. I do not remember signing more than one.

Q. There may have been more circulated?

A. I do not know whether there was or not.

Q. You do not know whether it was ever filed in the recorder's office?

A. I do not know it was; suppose it was.
Q. Well, you do not know?
A. No, sir.
Q. How did you sign this instrument?
A. M. A. Warner.

CHARLES F. KRAUCH, a witness called in behalf of plaintiff and examined by Mr. Rogers:

Q. Your name is C. F. Krauch?
A. Yes, sir.
Q. Mr. Krauch, in March, 1892, you were the owner of property on 25th street, in Ogden city, between Wall and Washington avenues?
A. Yes, sir.
Q. Between Lincoln and Grant?
A. Yes, sir.
Q. 30.25 feet frontage on 25th street. Is that right?
A. Yes, sir.
Q. I will ask you if in March, 1892, you signed a protest against the paving of 25th street.
A. I was against the rock; but I am satisfied——
Q. Did you sign a protest against it?
A. Not as I know of.
Q. Did you not sign a protest and take your name off afterwards?
A. I took my name off.
Q. Well, you signed it?
A. Well, I am in favor of the paving of——
Q. You signed a protest in the first place, did you not?
A. I do not think I did.
Q. How could you take your name off if you did not sign it?
A. Will you get the paper and show it? That is the way to find out. I do not remember of signing it. I talked against it at
157 first, because I did not want rocks; but I am in favor of paving, and I never signed against it, but I talked against the rock.
Q. You say you had your name taken off?
A. I never signed against it, but I was against the rock.

COURT: Answer this question, Mr. Krauch.

Q. You had your name taken off?
A. How taken off?
Q. Off the peper.
A. Off the paper?
Q. Yes, sir.
A. Well, now, that is something I am not positive about. I do not believe I ever signed against it, but if you can show it that is the way to prove it. Whatever my signature says I will stand by.
Q. Mr. Krauch, is it not a fact, in the first place——

A. They had that thing all mixed up; it is the funniest thing I ever heard of.

COURT: Mr. Krouch, you will answer when you are asked a question.

Q. Now, Mr. Krouch, is it not true, in the first place, you signed a protest against paving, signed the same protest that D. H. Peery signed, and that afterwards you took your name off that protest? Now, is not that the truth, according to your best recollections?

A. I am not positive as to that. I believe I was against the rock business; it is all mixed up.

COURT: You must answer the question and then stop.

Q. Is it not true, Mr. Krouch, that you were shown a protest against the paving of 25 street?

A. You mean when they was against it?

A. Yes; before the council met and decided what kind of paving they were going to have.

A. Well, I could not say so certain about that.

Q. What is your best recollection, Mr. Krouch?

A. My best recollection about the whole thing is that I
158 was against the *the* rock business, and when they selected to put in asphaltum I was satisfied. That is what you ought to put down. When a man is——

Q. Don't you remember, before the council decided to put down asphaltum pavement, that you were opposed to paving of 25th street?

A. No, sir; I was not to paving, but——

Q. Before the council decided to put down asphaltum?

A. I was in favor of paving, but always against the rock.

Q. Now, the first paper that was shown you was a protest against paving and was the paper which had Mr. Peery's name——

A. There was a whole lot of things; it was all mixed up.

Q. Wait until I get through my question. You were shown a paper-writing, which was a protest against the paving of 25th street, and had the name of D. H. Peery at the head of it, were you not?

A. At the time Henry was in for it I was right for it.

COURT: Answer that question, Mr. Krouch. Mr. Rogers asked you the question if the first paper shown you was a protest.

A. I signed in favor of it then.

Q. Answer my question, Mr. Krouch. Were you shown a paper protesting against the paving, with the name of the old gentlemen, D. H. Peery, not Henry Peery, at the head of the paper?

A. I do not remember anything from the old gentlemen's name.

Q. Do you remember being shown a paper protesting against the paving of 25th street with the Stephens' names on?

A. The Stephens were in favor of paving; yes.

COURT: You will be fined for contempt of court, Mr. Witness, if you do not answer the questions.

Q. Now, answer the question, Mr. Krouch. Don't you remember the fact of seeing a paper with the name of Stephens on it, protesting against the paving of 25th street, early in March?
A. Against it?
Q. Yes, sir.
A. I did not sign one against it, to the best of my knowledge.
159 Q. Were you shown a paper—did you see a paper?
A. They come to me about it, but I did not sign it.
Q. Now, is it not true, Mr. Krouch, that you first signed a protest and afterwards took your name off? Is it not true?
A. Not to my knowledge.

GEORGE W. LASHUS, a witness for the plaintiff, duly sworn and examined in chief by Mr. Rogers:

Q. Mr. Lashus, in March, 1892, were you a property-owner on 25th street between Wall and Lincoln?
A. I was.
Q. I will ask you if at that time you signed a protest against the paving.
A. I did.
Q. Who had the protest?
A. If I recollect right, it was William Chapman and George Murphy. I would be sure of both of them.
Q. It was a protest that they were carrying around?
A. Yes, sir.
Q. You at that time owned how many feet fronting on 25th street?
A. 50 feet.

Cross-examination:

Q. Mr. Lashus, do you remember—do you say you signed the paper?
A. Yes, sir.
Q. You signed a paper purporting to be a protest. Is that what you mean?
A. A protest against the paving—yes, sir.
Q. You signed a paper purporting to be a protest against paving?
A. Well, it was that way.
Q. Do you know whether it was ever filed with the recorder or not?
A. I couldn't tell.
Q. You do not know but what there was more than one petition circulated—more than one paper?
A. Well, no; I do not know. I think there were several, and each of the same character, if there was more than one.
160 Q. You withdrew afterwards, did you?

Mr. ROGERS: We object to that as being immaterial, irrelevant, and incompetent. We make the objections *pro forma*.

COURT: He may answer.

Plaintiffs' council excepted.

A. Yes, sir.

Q. You did withdraw your name from the protest?

A. I did.

Redirect:

Q. How long afterwards.

A. Some time. I could not tell exactly.

Q. Two weeks or a month?

A. To the best of my recollection, it was a month or more.

Q. A month or more after the day that the protest was called for in the notice of intention to be filed with the city recorder?

A. Why, yes; it was a month or more after I signed the protest that I withdrew my name.

Q. And you signed the protest in the last part of March, 1892?

A. Well, I could not tell the date, but I know I signed the protest.

Q. What is your best recollection?

A. Well, I should say that it was some time along in March. Of course, I cannot exactly tell the date.

Recross:

Q. It may have been the first of March, may it not, Mr. Lashus, that you signed it, or before that?

A. Well, I could not exactly say.

Q. Well, it may have been or not?

A. The day I was approached—they came around—that day I signed.

Q. It may have been the first of March or about that? You only have to give an opinion, Mr. Lashus. What is your best idea about it?

A. Well, I could not exactly tell what the date was.

161 Q. It may not have been over a week when you withdrew, may it?

A. Yes, sir; it was more than that.

Q. Are you certain that it was over two weeks?

A. Yes; I think it was over three weeks.

Q. Do you know it was over four?

A. No; I could not.

Q. It may have been between three and four weeks?

A. Four and five weeks, I should dare say—four or five weeks.

Q. That is, it may have been as early as three weeks, may it not have been?

A. No; I think the circumstances would lead me to know better where I was.

MARK LINDSEY recalled by Mr. Rogers:

Q. Mr. Lindsey, you know Mr. Krouch?
A. I do, sir.
Q. How long have you known him?
A. Well, I guess it is three or four years; ever since he came here.
Q. Done business with him?
A. Never.

Mr. WHIPPLE: What is the purpose of this testimony?
Mr. ROGERS: We are proving that Krouch signed the protest.
Mr. WHIPPLE: I submit that he cannot impeach him.
COURT: Proceed.

Q. Did you see his name on that protest which Emma Munns signed?
A. I did, sir.
Q. Do you know who signed it?
A. I do not know who signed it, but I saw his name on the protest; that was certain.
Q. Do you know his signature when you see it?
A. I do not know that I would.
Q. You are not able to say whether that *his* was his signature?
A. No, sir; I saw his name on the protest; that is all I could say.

Mr. WHIPPLE: Defendant moves to strike out the evidence because it is immaterial, irrelevant, and incompetent.
COURT: Of course, if they do not connect it by more evidence it may go out; it will stand for the present.

162 S. C. STEPHENS recalled by Mr. Rogers:

Q. Mr. Stephens, do you know Mr. Krouch?
A. Yes, sir.
Q. I will ask you if he ever said anything to you about signing this protest.
A. Yes, sir; he told me and my brother that he signed it.
Q. Did you see his name on there?
A. No, sir; I never saw it.

Mr. ROGERS: Will you admit that his brother will testify to the same thing?
Mr. WHIPPLE: Yes.
Mr. ROGERS: It is admitted that W. J. Stephens would so testify.
Mr. ROGERS: Now, may we have a finding of the court that Krouch signed?
COURT: I will not pass upon that question now.
Mr. ROGERS: It is admitted that John Maguire signed the paper which was filed with the city recorder March 29th, 1892.

T. P. BRYAN, called for the plaintiffs and examined in chief by Mr. Rogers, testified as follows:

Q. Mr. Bryan, in March, 1892, were you the city recorder of Ogden city and acting as such?

A. I was.

Q. On this paper-writing, purporting to be a protest against the paving of 25th street, I will ask you if there appeared thereon the name of E. J. Watkins and the name of Liddie Wadman, according to your best recollection.

A. Yes, sir.

Q. And this paper-writing is the same paper-writing which was handed you by Mr. Peery that was filed in your office?

A. It was the peper that was filed in my office; I could not testify as to its being filed by Mr. Peery.

Q. It was the peper that was filed?

A. It was the peper that was filed with me; yes, sir.

Cross-examination:

163 Q. Did you know the signature- of these people?

A. I did not.

Q. You did not know whether they were put there with authority or not?

A. I did not.

Q. They simply appear on the paper?

A. They appeared on the paper.

Mr. WHIPPLE: I move to strike out the evidence as incompetent.

Mr. ROGERS: We do not offer it for the purpose of showing that they signed their names.

COURT: I think the motion will be denied.

W. T. BEARDSLEY, called on behalf of the plaintiffs and duly sworn, testified in chief as follows:

Q. Mr. Beardsley, are you the city auditor?

A. Yes, sir.

Q. And were you in December of last year?

A. Yes, sir.

Q. Turn to—this is what book?

A. Special assessment plat or roll.

Q. Of Ogden city?

A. Yes, sir.

Q. Turn to that book where the assessments were paid on paving district No. 2 December of last year.

A. Yes, sir; commencing there and ending here.

Q. That is very indefinite.

A. What particular——

Q. Commencing on page——

A. 72 and ending on page 76; there are marked the payments that were made.

Q. And this book contains a correct list of what was paid?
A. Yes, sir.
Q. I will ask you if before making the payments at that time a protest in writing was presented to you, to the treasurer of the city, by certain persons then paying.
A. Yes, sir.
Q. And being this protest?
A. Yes, sir.
Q. These are the signatures to that particular protest?
Q. There are one, two, three, four, five, and six protests.
164 Q. Well, there is one——
A. 5.
Q. 5?
A. Yes, sir.

Mr. ROGERS: Now, I will read these protests:

OGDEN CITY, *December 30th*, 1893.

C. M. Brough, treasurer of Ogden city:

Notice is hereby given that the undersigned pays the special tax or assessment levied upon *this* pro-erty in paving district No. 2, in said Ogden city, under protest and intends to sue to recover the money back so paid.

That the grievance and grounds thereof and of this protest are:

First. That on or before March 29th, 1892, petitions were filed with the city recorder of said city, signed by property-owners in said district, protesting against the levying of any local assessment or taxes against or upon their property for the purpose of paving 25th street, in said district and city; that the whole number of front feet owned by those persons so protesting with frontage on 25th street in said district is and was about 3,000 feet, which is and was more than one-half of the whole frontage on said 25th street within said district liable for assessment or taxes.

Second. That in letting the contract for said paving said Ogden city limited bidders to *bona fide* residents of Ogden city, and would not permit general competition for the doing of said paving.

Thirs. That the notice of intention to create said paving district given by said city was illegal and void in this, that it is and was uncertain *in this that it is and was uncertain* and indefinite in that it does not state whether it is or was the intention to pave or mec-
ad*i*mize said district, sand, if to pave, the kind of material to
165 be used; that the whole of the lands to be affected by said local assessment is and was not sufficiently described; that it provided for the hearing only of written objections; that the cost of the work could not be properly estimated without designating the kind of material to be used.

Fourth. That said tax or assessment is void and illegal in this, that at the time of creating said paving district or afterwards there

was no provision made for any special fund out of which said pavement should be paid for.

(Signed) L. R. ROGERS.
W. C. WARREN.
J. C. ARMSTRONG.
J. H. SPARGO.
H. I. GRIFFIN.
JOSEPH CLARK.
CLARK, EMMET AND THOMPSON.
PATTERSON AND CLARK.
JOHN NICHOLAS ESTATE,
By GEO. M. CARR, *Administrator.*
JOHN NICHOLS,
By GEO. M. CARR
His Agent and Attorney-in-fact.
S. C. CHAPMAN,
For the Estate of William Chapman, Deceased.
WILLIAM DRIVER,
By G. W. DRIVER, *Attorney-in-fact.*
G. W. LASHUS.
W. H. STEPHENS.
J. E. AND ANN HORROCKS.
166 W. KAY.
JOHN PINCOCK.
M. BIEHL.
C. F. TAYLOR,
By J. C. ARMSTRONG.
JOB PINGREE,
By JAMES PINGREE, *Attorney-in-fact.*

Mr. ROGERS: Another protest, No. 2:

PROVO, UTAH, *December 8th*, 1895.

Willis T. Beardsley, Esq., city auditor, Ogden city, Utah.

DEAR SIR: I hereby enter my protest against the payment of the paving tax against the property owned by Realty Company on 25th street, Ogden city, Utah, and in paying said taxes I pay it under protest.

REALTY COMPANY OF KITTERY, MAINE,
By D. H. PEERY, JR., *Agent.*

Protest No. 3.

PROVO, UTAH, *December 8th*, 1895.

Willis T. Beardsley, Esq., city auditor, Ogden city, Utah.

DEAR SIR: I hereby enter my protest against the payment of the paving tax assessed against my property of 25th street, Ogden city, Utah, and in paying said tax I pay it under protest.

D. H. PEERY, JR.

Mr. WHIPPLE: As to protest No. 1, the defendant objects to the introduction in evidence so far as it relates to the letting or limiting bidders to *bona fide* residents of Ogden city; second, so far as
167 it relates to the notice of intention to create said paving district given by said city as illegal and void, for the reason that it is uncertain and indefinite, because the supreme court of the Territory has passed upon said notice and held it good; third, it is objected to so far as it refer-d to the fact that no special fund out of which the pavement should be paid was provided for, and, fourth, so far as the names appearing upon the said protest as represented by attorneys, agents, and administrators without their first showing their authority to so represent them.

COURT: Objection overruled.

Mr. WHIPPLE: These others I object to—Nos. 2 and 3 because they nowhere state that suit will be brought to recover the taxes, as provided in the statutes; and, further, that Nos. 2 and 3 are directed to the city auditor, when the statute provides that they shall be directed to the city collector, who, under the law at that time, is the city treasurer.

COURT: They can go in subject to the objection.

Mr. ROGERS (to witness): Now, Mr. Beardsley, in December, 1893, C. M. Brough was the treasurer of Ogden city and acting as such?

A. Yes, sir.

Q. Now, on the day that this protest was delivered to Mr. Brough, as treasurer, I will ask you if *the* Ogden city was not on that day about to sell the property of the persons so protesting situated on 25th street between the west line of Washington avenue for the non-payment of this alleged assessment.

Mr. WHIPPLE: The defendant objects to the question for the reason that it is immaterial under the issues and under the statutes of this Territory.

COURT: It may go in, and argue it at the close.

(Question read to the witness by the reporter.)

A. Yes, sir.

168 Q. When I say assessment I mean assessment for the payment of the paving of 25th street.

A. Oh, yes, sir.

Q. The first installment thereof?

A. Yes, sir.

Q. And the property was advertised to be sold at high noon on that day?

A. I think that was the hour.

Q. This assessment is payable in ten annual installments?

A. Yes, sir.

Q. First installment falling due December 30th, 1893?

A. No, sir; it fell due in March of 1893—March 25th, I think is the date; it says here in the record.

Q. And one installment becomes due each year thereafter?

A. Yes, sir.

Q. For nine consecutive years?
A. Yes, sir.
Q. And the total assessment of tax being divided into tenths?
A. Yes, sir.
Q. With interest added on each deferred payment?
A. At the rate of seven per cent. on the deferred payments.
Q. Now, these two protests known as Nos. 2 and 3, the first being the Realty Company of Kittery, Maine, and the second D. H. Peery, I will ask you if you did not upon receipt of these deliver them to the treasurer, Mr. Brough.
A. Yes, sir.
Q. Or Pingree, whoever was the treasurer?
A. Well, I was the deputy treasurer. It did not need to go any further than myself.
Q. But Mr. Brough got them?
A. Yes, sir; he was cognizant or overlooked the papers in the office.

Mr. WHIPPLE: I object to the testimony on the ground that the protest is not sufficient in form; that the statute provides that they must state they will bring suit to recover.
COURT: They will be admitted subject to the objection of the defendant.

169 Q. Now, can you turn to your books here and tell us how much taxes did L. R. Rogers pay under that written protest?
A. Two amounts, or $31.92 and $42.12.
Q. How much did J. C. Armstrong pay?
A. $95.04.
Q. Mathias Biehl?
A. $63.
Q. Joseph Clark?
A. $48.
Q. William Chapman estate?
A. $49.20.
Q. Clark, Emmet and Thompson?
A. $30.
Q. William Driver?
A. $60.
Q. H. I. Griffin?
A. $23.76.
Q. Lamoni Grix?
A. $24.90.
Q. Ann Horrocks?
A. $39.
Q. Look again.
A. Well, there is—that property is divided—that is, it belongs to one family. It was $78 the two amounts, James E. and Ann.
Q. How much did they pay together?
A. $78 together.
Q. George W. Lashus?
A. $60.

Q. H. D. and J. S. Lewis?
A. $82.08.
Q. Carrie Lewis?
A. $30.
Q. Joseph Morely?
A. $36.
Q. Patterson and Healey?
A. $30.
Q. Patterson and Clark?
A. $60.
Q. J. H. Spargo?
A. $48.
Q. W. H. Stephens?
A. $14.70.
Q. Carl Sorenson?
A. $20.40.
Q. C. W. Warren?
A. $48.
Q. The Nichols estate?
A. $160.08.
Q. D. H. Peery, Jr.?
A. $24.
Q. Realty Company?
A. Their whole assessment of $748.80.
Q. It would be one-tenth?
A. No; they paid the whole assessment.
Q. William Driver?
A. $60.
170 Q. W. Kay?
A. $24.94.
Q. John Pincock?
A. $26.40.
Q. C. F. Taylor?
A. $112.08.
Q. Job Pingree?
A. $35.40.
COURT: Mr. Beardsley, did you give the aggregate amount?
A. No, sir; I did not.
COURT: It is stated in the complaint the aggregate amounts?
Mr. ROGERS: No, sir; it is not stated, but it is capable of ascertainment.

It was admitted that the total amount paid to the contractor for performing this contract for paving on 25th street within the limits of the alleged paving district amounts to the sum of $64,600.00.
Plaintiffs rest.

Defense.

J. C. ARMSTRONG, a witness called on behalf of defendant and examined in chief by Mr. Whipple, testified as follows:

Q. Mr. Armstrong, where were you on March 29th, 1892?

A. Really I do not know whether I was—my impression is that I was on my way from San Francisco up here.

Q. But that you had not got there yet. That is your impression?

A. I do not think I had. I know I was in San Francisco along in March, and I think I arrived here on or about the first of April.

Q. Did you hear the witness here testify in this case that you has signed a protest?

Mr. ZANE: We object to that. The witness did not testify to that. He testified that Mr. Armstrong's name was on the protest.

Q. Did you hear the witness testify to that fact?

A. I did.

Q. Did you sign a protest yourself?

A. I did not; but my recollection is that I wrote to Mr. Hill.

Q. Wrote to whom?

171 A. To Mr. Hill, of the Commercial, to sign for me.

Q. Do you know that he did sign for you?

A. I could not say, but I wrote a personal letter to Mayor Turner protesting.

Q. That was the way you protested, was it?

A. So far as actual protesting myself, but my recollection is that I wrote to Mr. Hill.

Q. Do you know that you did in fact write to Mr. Hill?

A. To the best of my recollection, I did.

Q. Which do you say, that you did or did not? How do you consider that you protested, by the letter to Mr. Turner or by writing to Mr. Hill?

Council — the plaintiff objected on the ground that the court must determine which of the protests were good or if both were good.

COURT: I can see the meaning of the council as to whether he should consider either to protest or both to protest.

Q. Didn't you write, in fact, a letter to the mayor and council, in which you said that you protested against paving?

A. I think I wrote such a letter.

Q. Is not that, in fact, all the communication you had with the council?

A. Yes; all the communication that I had with the mayor or the city council. I do not know but I wrote two letters, one letter to the mayor and one to the city council; I would not be quite positive as to that.

Q. You never wrote a letter to the city recorder, did you?

A. I do not think I did.

Q. Then, in fact, you did not protest, did you?

A. Well, I deemed that I protested. I wrote to Mayor Turner, to the city council, or both, of a protest against paving, and I think I gave my reasons.

172 Q. Do you say that you wrote more than one letter?

A. Well, I would not be quite positive as to that.

Q. You know that you wrote one?

A. I know that I wrote one, and I think maybe two, but I am quite positive I wrote one.

Q. Then, in fact, you did not write a letter to the city recorder?

A. I do not think I did.

Cross-examination by Judge ZANE:

Q. I understand you to say that you wrote to Mr. Hill?

A. My recollection is that I wrote to Mr. Hill in regard to the matter.

Q. To protest for you?

A. Yes, sir.

Q. What did you write to him about?

A. I wrote to him in regard to some other matters, and in the letter I told him that if anything came up in regard to the paving matter here to act in my place.

Q. To act for you?

A. Yes, sir.

Q. You afterwards ascertained that your name was on the protest, did you not?

A. I never saw the protest, but my recollection is I have been informed by a great many people that my name was on there.

Q. You heard that your name was on?

A. Yes, sir.

Q. Did you a-quiesce in it or did you agree to it?

A. Certainly I did.

Q. You ratified it in that way?

A. I did.

Redirect examination:

Q. You do not know whether Mr. Hill put your name on there or not?

A. I never asked Mr. Hill.

Judge ZANE: You wanted your name on there, did you not?

A. Yes, sir.

Mr. WHIPPLE: The defendant offers in evidence the following withdrawals from the protest. First, of W. Kay:

173 OGDEN, UTAH, *April 1st*, 1892.

To the honorable mayor and city council.

GENTLEMEN: I hereby request that my name be withdrawn from the remonstrance against paving 25th street between Washington and Wall.

Respectfully, W. KAY.

Filed 3.25 p. m., Apr. 2nd, 1892.

Mr. ZANE: We object to that document as irrelevant and immaterial; will argue the same.

Mr. ROGERS: And has not been proven that Mr. Kay signed it. We insist that he must prove his signature; we proved ours.

COURT: It may go in under objection.

Mr. WHIPPLE: The defendant offers in evidence the following withdrawal from the protest mentioned in this suit, which reads as follows:

To the honorable mayor and city council.

GENTLEMEN: I hereby request that my name be withdrawn from the remonstrances against paving 25th street between Washington and Wall.

Respectfully, CHAS. FOX.

Filed 3, 3, '92, 2 p. m.

Mr. ROGERS: We object to that; it is not proved that that is Mr. Fox.

COURT: The court will take the matter under advisement; I doubt very much whether that is admissable.

Mr. ZANE: We object also to it for the reason that it is irrelevant and immaterial.

174 COURT: Let it go in under objection.

Mr. WHIPPLE: The defendant also offers the following withdrawal:

Hon. mayor and city council.

GENTLEMEN: Please erase my name from the remonstrance against paving on 25th street between Washington and Wall avenues.

Very respectfully, JOHN MAGUIRE.

Filed 3 15 p. m., April 2nd, 1892.

Some objection and ruling were made.

Mr. WHIPPLE: The defendant offers the following withdrawal:

OGDEN, *March 29th*, 1892.

To the honorable mayor and city council.

GENTLEMEN: Having signed a remonstrance against paving Twenty-fifth street through a misunderstanding of the true facts in the case as to cost, etc., we hereby withdraw our remonstrance to said paving.

SCUDDER & CARLSON, ft. 23.

Filed 1.30 p. m., March 31st, 1892.

Mr. ZANE: We object to that as irrelevant and immaterial, and we object because the name of Mr. Scudder and Mr. Carlson is not signed. It may be that they are cotenants, and it may not appear where his cotenant got his authority.

COURT: It can go in subject to exception.

(Above four withdrawals were marked respectively Def't's Exhibits A, B, C, and D.)

Mr. ZANE: Get in our general objections to each one of these withdrawals that they are irrelevant and immaterial.

It was admitted that Mr. T. P. Bryan would swear that the signature of George Fox was his signature as appears on Defendant's Exhi*tib* B.

175 Mr. J. R. ELLIOTT, a witness called on behalf of the defense and duly sworn, testified in chief as follows:

Q. Major Elliott, what, if any, office did you hold in the city of Ogden in March, 1892?

A. I was a member of the city council from the Fourth ward; member of the city council.

Q. Were you acquainted with the proceedings about this paving of 25th district?

A. I was.

Q. You may state whether or not—I believe that is in evidence also—you were appointed a committee to compute the protesting for district No. 2, 25th street, by the city council.

A. I was, sir.

Q. Now, you may state what was done.

Judge ZANE: We object to that; the record will show that.

Mr. WHIPPLE: I want to simply call the gentleman's attention. You may examine this paper and see what you did as that committee.

Judge ZANE: They can put in the report. We object to anything but the record.

Mr. WHIPPLE: I just want to show by him that he had in his possession all the protests that were filed with the recorder, and that he had in his possession all the withdrawals.

COURT: Admitting that was true, could he come here and testify anything *de hors* of anything in the report?

Mr. WHIPPLE: I am simply showing how this computation was made.

COURT: He may answer the question. I do not see how this computation is material. I will strike it out if it is not.

Plaintiff's counc*il* took an exception.

Mr. WHIPPLE: I propose to show that this gentleman made that computation, and that he had in his possession the original withdrawals, and that this report is correct.

Judge ZANE: We submit to your honor that the withdrawals themselves are the best evidence of the withdrawal. He can-

176 not come in here and testify as to his general result and general calculations unless they can show whether the original withdrawals or the contents of it *it it* is lost.

COURT: The court understands that very clearly.

Mr. WHIPPLE: I supposed that was submitted some time ago,

that those withdrawals were lost. I am now offering the contents of these withdrawals.

Mr. ROGERS: We do not admit that they are lost.

T. P. BRYAN, recalled by Mr. Whipple, testified in direct examination as follows:

Q. What office, if any, did you hold in Ogden city in March, 1892?

A. I was the city recorder.

Q. Do you remember whether or not there were certain withdrawals filed from the protest to paving 25th street, filed in your office about that time?

Q. About March 29th?

Q. Yes; and before and after.

A. Not before, I do not think, but afterwards there were.

Q. Do you remember how many feet frontage upon the district in question was represented by these withdrawals?

Counsel for plaintiff- objected to this as irrelevent, incompetent, and immaterial.

COURT: It seems to me that is incompetent.

Mr. WHIPPLE: Have you searched for those withdrawals in the office of the city recorder?

Counsel for plaintiff- objected on the ground that he was not the custodian.

COURT: He can testify as to what search he made.

A. I have searched for those amounts and papers; not only the withdrawals, but the protest itself.

Q. Where did you make your search?

177 A. In the city recorder's office, in the vaults and safe in the city hall, in Ogden city.

Q. Did you search in such place as they were likely to be found in?

A. I did; I searched in the office where they were kept by myself.

Q. And was unable to find them?

A. I could not find them; no, sir.

Mr. WHIPPLE: Now, then, unless it will be admitted that this is sufficient to show that they were lost, I will have a suppœna for the city auditor and recorder and have them here. I supposed that was in the record and stood as an admission on the record.

COURT: I do not think there was any admission.

COURT: It is admitted on the record that Mr. Whipple had made due search in the city recorder's office for the protest, and also the withdrawals that related to the paving in district No. 2, 25th street, and was unable to find them.

Mr. ROGERS (to Mr. Whipple): State when you made it.

A. I made the search some time last April, I think about then, with the city recorder, Mr. Bryan, and I have also made several

searches since that time, and have made inquiries from every source from where I thought they might be found.

Q. Did you ever ask Wilkinson?

A. No; I did not suppose that he would know anything about that.

(Mr. Bryan, the witness, then made the following statement:) I would like to state in regard to part of the testimony that part of the withdrawals are in existence now. The withdrawals that the attorney for defense has offered in evidence are a part of the withdrawals. They are a part of it. I can testify to all but some of the original withdrawals.

Mr. WHIPPLE: Were these withdrawals in writing or verbal?

178 A. A part of them were verbal, in two instances.

Mr. ROGERS: And part in writing?

A. Partly in writing, and in two instances they were verbal.

Q. Now I will ask you if you know who those parties were who withdrew verbally.

A. I do.

Q. State their names.

A. D. H. Peery, Jr., for himself, the Boston Realty Company, and L. P. Burchfield.

Q. What did he say?

Counsel for plaintiff objected as irrelevant and immaterial on general ground that a withdrawal could not be had; on the second ground that the notice of withdrawal must be in writing; the notice of withdrawals must be of equal validity.

COURT: That can be received subject to the objection and argument afterwards.

Exception taken by plaintiffs.

At this point and time and adjournment was had until 9 o'clock a. m., October 3rd, 1894.

OCTOBER 3RD, 1894—a. m.

Mr. WHIPPLE: The defendant offers in evidence the following, being a part of the certified copy of the records of Ogden city, relative to the paving district No. 2, on 25th street:

The council met at 3.30 p. m., Mayor Turner presiding.

The following members were present at roll-call: Councillors Cannon, Dee, Elliott, Graves, Lundy, McManis, Shurtliff, and Spencer.

Councillor Elliott, to whom was referred the protests in paving district- Nos. 1, 2, and 3, reported, stating that he had carefully compared said protests with the records and found that a majority of froont feet in district No. 1 had protested against the levying of local tax for paving, and that in district No. 2 the total number of

179 feet protesting was 1,878⅔, leaving 2,081⅓ feet in favor of levying a local tax for paving.

Mr. WHIPPLE: If it should turn out that there is any error

as to the record introduced by plaintiff not having all been — it may be entered by the stenographer.

Mr. ZANE: Subject to our objection that it is immaterial, irrelevant, and incompetent.

Mr. WHIPPLE: It is understood that all of the records are now in evidence, except the question of receiving the bids.

Mr. ZANE: Subject, of course, to our objection.

Mr. WHIPPLE: The defendant now offers in evidence that portion of the record of the special committee to compute the number of feet in frontage of those protesting and those not in district No. 2 on 25th street, being the district in question in this suit, on April 14th, 1892, the part not heretofore introduced by plaintiff-, as follows: Withdrawals from same, filed March 26th, 1892, 435.33 feet; number of feet protesting, 1,878⅔ feet; number of feet if favor of paving, 2,081⅓ feet; whole number of feet over those protesting, 202⅔ feet.

(Signed) J. R. ELLIOTT,
Special Committee.

Filed on back:

"Report of special committee, paving districts Nos. 1, 2, and 3."

Mr. ZANE: We object to it as immaterial, irrelevant, and incompetent.

COURT: It may be received.

"Exception taken by plaintiff-."

T. P. BRYAN, being called for the defense, examined in chief by Mr. Whipple:

Q. Mr. Bryan, you may refresh your memory by examining this.

Mr. ROGERS: Let us see whether that refreshes his memory or not.

—. This paper was made by you last night, was it not, Mr. Bryan?

180 A. That paper, I do not know. I cannot tell from there.

(Paper shown him.)

Answer. No, sir.

Mr. WHIPPLE: Was it made at your dictation?

Mr. ROGERS: Whose writing is this, Mr. Bryan?

A. That is Mr. Beadrsley's writing.

Q. Written last night?

A. I think so.

Q. Where?

A. It was written in Mr. Whipple's office.

Mr. WHIPPLE: Do you remember whether Mr. Krouch's name was on that protest or not?

A. What protest, Mr. Whipple?

Q. Upon the protest or the paper that has been said to have been filed with the city recorder on March 29th, 1892.

Q. Protest against paving 25th street?

A. Yes, sir.

A. Mr. Krouch's name was on the list on that protest.

Q. Did you afterwards have any conversation with him about withdrawing his name from the protest?

Mr. ROGERS: Let him state whether he did or not.

A. I don't know whether you call it conversation; the conversation was all on Mr. Krouch's part.

Q. Did he come to you to withdraw from the protest?

A. Yes, sir; he did.

Q. State what he said.

Plaintiffs' counsel objected on the ground that it was immaterial, irrelevant, and incompetent.

Q. When did the conversation occur; before the city council acted on the protest?

A. Yes, sir.

Q. State what that conversation was.

Mr. ROGERS: We renew the objection, if your honor please.

COURT: I think he may answer.

Exceptions noted by plaintiffs.

Q. Answer.

A. Well, Mr. Krouch stated that he had signed this protest——

181 Counsel for plaintiffs here further objected as it being hearsay also.

COURT: I doubt that this is admissible. It seems to me that is hearsay.

Mr. WHIPPLE: We will take a ruling upon the objection. We are entitled to close on the motion.

After argument on the objection by Judge Zane, Mr. Whipple stated, I will go on with another feature of it until I can get Mr. Krouch in.

Q. Was there in fact a paper purporting to be a protest filed with you as city recorder on March 29th, 1892, to this paving in question?

A. Yes, sir.

Q. You know about the time it was filed?

A. Yes, sir; it was filed in the morning before 10 o'clock.

Q. Was the name of D. H. Peery on that protest?

A. Yes, sir.

Q. Jr.?

—. Jr. D. H. Peery or Jr.

Q. D. H. Peery, Jr.?

A. Yes, sir.

Q. Was the name of Rebecca McKee on that protest?

A. Yes, sir.

Q. Are you acquainted with her signature?

A. I am not.

Q. Are you acquainted with the *signature* in which it was written?

A. I am.

Q. State, if you know, in whose handwriting it was written.
A. It was in the handwriting of Caleb I. McKee.
Q. Was Charles Reid's name on that paper?
A. Yes, sir.
Q. Are you acquainted with the handwriting it was written in?
A. Yes, sir.
Q. In whose handwriting was it written?
A. Charles Reed's.
Q. Was the name of Mrs. Butterworth on that protest?
A. Yes, sir.
Q. Are you acquainted with her handwriting?
A. I am not.
Q. Are you acquainted with the handwriting in which it was written?
A. I am not.
Q. Was the name of J. M. Major on the protest?
182 *Q. Was the name of J. M. Major on the protest?*
A. It was.
Q. Did you see him sign it?
A. I did not.
Q. Are you acquainted with the handwriting in which it was written?
A. Well, at the time I think I knew Mr. Major's signature.
Q. Was that his handwriting?
A. I think it was, to the best of my knowledge.
Q. Was the name of Geo. M. Kerr on that protest?
A. It was not.
Q. You swear positively that the name of Geo. W. Kerr was not on that protest?
A. I do.
Q. Now, you may state whether or not you are acquainted with David Evans.
A. Yes, sir.
Q. Did you have a conversation with Dave Evans on that day or before the protest was acted upon by the city council with regard to this protest and his name upon the same?
A. I did.
Q. State what that conversation was.

Mr. ROGERS: Of course, we object as immaterial, irrelevant, and incompetent.

COURT: If the rule of the court was right in regard to Mr. Krouch, the same rule would apply to Mr. Evans' declaration to this witness.

Mr. ROGERS: If Mr. Bryan will swear that Mr. Evans ever constituted him his agent, let him swear to that direct.

Mr. WHIPPLE: Now, what, if anything, did Mr. Evans say to you with regard to his name being on the protest?

Mr. ROGERS: We renew our objection.

Mr. WHIPPLE: And did he tell you to take his name off——

Mr. ROGERS: We renew our objection.

Mr. WHIPPLE: If we do not prove an agency, it may go out.
COURT: It may go in subject to the objection.
Mr. ROGERS: We except.

183 Q. State what that was.
A. Why, he said that his name——
Q. Did you have that conversation after the protest was filed and before the city council acted upon it?
A. Yes, sir.
Q. Now, go on; state what it was.
A. He said that his name was on that protest; he understood that it was there, and asked me if it was true, and I told him it was. He said that his name was put there without authority by him; that he was in favor of paving the street.
Q. Did he tell you to take his name off and authorize you to do so?
A. No; he did not.
Q. What did he do?

Mr. ROGERS: We object to what he did do if he did not do that. That is all hearsay.
Mr. WHIPPLE: Let us see what the witness understood.
COURT: The court will hear it, Mr. Rogers.

Mr. WHIPPLE: What conversation did occur?
A. He said that he wanted his name as in favor of paving the street; that he wanted it removed from there; that he wanted to be understood definitely as in favor of paving of the street.
Q. Did he ask you to take his name off?
A. I think not.
Q. Did you take his name off?
A. I cannot remember whether he took his name off the list or not. In one sense it was taken off the list.
Q. Did you notice the name of——

Mr. ROGERS: Now, if your honor please, at this stage we move to strike out all of the testimony of this witness relating to any conversation had between himself and Mr. Evans.
COURT: It may go out.

Cross-examination:

Q. You say the name of Geo. M. Kerr was not signed to the protest?
A. No, sir.
Q. That is your best recollection?
184 A. No; I know it was not.
Q. How do you know?
A. Well, I know it because I saw the protest, and it was not on there, Mr. Rogers.
Q. That is, your recollection is that it was not there?
A. No, sir; it is not a matter of recollection; it is knowledge, positive.
Q. How long has it been since you saw this protest?

A. Positively not since the first day of January, 1892, when I went out of this office.

Q. You have not seen it from that day to this?

A. No, sir.

Q. Since that time you have engaged in other persuits than that of recorder?

A. Yes, sir.

Q. You have been extensively engaged in the mining business?

A. Yes, sir.

Q. Managing mining operations?

A. Yes, sir.

Q. Operating mines?

A. Yes, sir.

Q. Devoting your time, attention, and mind to those persuits?

A. Yes, sir.

Q. Have not been giving this question a thought?

A. No, sir.

Q. Was John Nichols on the same protest?

A. Yes, sir.

Q. Gomer Nichols?

A. Yes, sir.

—. Jane Nichols?

A. Yes, sir.

—. Rose Nichols?

A. Yes, sir.

Q. Leslie Nichols?

A. Yes, sir.

Q. E. H. Watkins' name—was that on?

A. Yes, sir.

Q. Was the name of Libbie Wadman signed?

A. Mistress Libbie Wadman.

Q. Mistress Libbie Wadman—was that on the protest?

A. Yes, sir.

Mr. WHIPPLE: Now, I object to all this; that it is not cross-examination.

185 Mr. ROGERS: The gentleman should have made this objection at the time.

COURT: I think it is proper to test his recollection and you may take an exception.

Mr. WHIPPLE: I withdraw the objection, if that is the purpose.

Q. You knew Caleb McKee, you say?

A. Yes, sir.

Q. He was a realty operator here?

A. Yes, sir.

Q. And Rebecca W. McKee was his mother?

A. I do not know.

Q. She did not live here?

A. Not that I know of.

Q. He was acting as her agent at the time, was he not?

A. I do not know. I rather think so.

Q. That is your best recollection about it?
A. Yes, sir.
Q. Acting as her agent concerning all her real-estate affairs?
A. I could not say all that. I know of no instance that he acted as her agent, but it was my belief that he did.

Mr. WHIPPLE: I object unless it is shown of what the agency consisted. It is not material.
COURT: I do not think his testimony thus far would establish an agency. It will go in for what it is worth.

Q. This protest which you have been testifying to also had the name of Mistress H. A. Lewis, did it not?
A. It had the name of Mistress H. A. Lewis or Mistress Harriet A. Lewis; I do not remember which. I think it was Mistress H. A.

J. R. ELLIOTT called for the defence and examined in chief by Mr. Whipple:

Now, this evidence that we undertook to get in last evening, I simply want to get it in the record. I will ask the question, so that the court may protect itself.
Q. Major Elliott, what office, if any, did you hold in Ogden city on March 29th, 1892?
COURT: He answered that yesterday. He said that he was city councillor.
186 Q. Who, if anybody, was appointed a committee to compute the amount of protests and withdrawals that were then on file in the recorder's office?

Judge ZANE: We object to that. I suppose the records will show who was appointed the committee.
COURT: The record will be the best evidence of that. It has already been proven that he was appointed and he may answer.

Q. You may state whether or not, as such committee, you had in your possession all the protests and all the withdrawals of the same, and whether or not from such originals you made an actual computation.

Judge ZANE: We object to that as immaterial, irrelevant and incompetent, and hearsay testimony; is calling for the opinion or conclusion of this witness as to whether or not he had all the protests; also as to whether or not he had all the withdrawals; calling for his opinion or conclusion, further, as to whether they were withdrawals or not. It is not stating who it was that made the withdrawals. The time is not stated, and it is hearsay testimony, and it is calling for his deduction, opinion, conclusion, or calculation of the contents of several written instruments without first making proof of the contents of those written instruments.
COURT: This question does not go to the admissability of those contents. The only valid ground I see for your objection is the making of the witness a judge as to what is a protest and what is a withdrawal. I think he may answer the question. Give the plaintiff an exception.

Q. Answer the question, Major.

A. These are the facts, according to the report which I filed and presented to the council: The deduction was made from the papers in my possession, which constituted all the parties who were objecting to paving, and also the parties that had withdrawn their
187 objections—withdrawn their objections to paving—in my possession.

Plaintiffs' council moved to strike out the answer of the witness as not responsive to the question.

COURT: He has not given the contents as yet; the answer may stand.

Exception taken by plaintiffs.

Q. You made the report, did you?

A. I did, sir.

Q. What was the result of that report, Major?

Judge ZANE: There is better evidence of that, your honor.

COURT: Objection sustained.

C. F. KROUCH called on behalf of the defendnatn and examined in chief by Mr. Whipple.

Q. Mr. Krouch, do you remember about the time this paving was going on on 25th street?

A. I remember about that time; yes.

Q. Do you remember anything about there being a paper which purported to be a protest circulated?

A. Circulated—yes.

Q. Do you remember having gone to the city hall some time about the 29th of March and having a conversation with the city recorder and with Major Elliott?

A. It has come to my memory now; yes; about that time.

Mr. ROGERS: We desire to save our objections to the materiality and relevancy of this testimony.

Mr. ROGERS (to witness): What is the best of your recollection? You say you remember it now; what has made you remember it now?

Mr. WHIPPLE: Answer the question, Mr. Krouch.

A. Because my attention was called.

Q. Who by?

A. Do I have to answer that?

COURT: Yes, sir.

Mr. WHIPPLE: Answer it.

188 Mr. ROGERS: *Mr. Rogers* Mr. Krouch, won't you answer my questions unless you are told by Mr. Whipple?

A. I will answer to the truth to the best of my knowledge.

COURT: Proceed. Who called your attention to it?

A. Well, Mr. Ell-ott and Mr. Whipple; about I went to the city hall and that my name was on before I went over and I did not want to be against it.

Q. When was that done?
A. I could not remember the day. You know how I made my statement yesterday, that I was not certain.
Q. How long was this after you signed it?
A. I could not tell exactly; it was right shortly afterwards.
Q. A week or ten days?
A. I could not remember the time.
Q. Give us your best recollection of the time.
A. It would be pretty hard thing for me to do, to misrepresent anything; you noticed how I was mixed up yesterday.
Q. You are a little mixed up today, aren't you? About how long after was it, Mr. Krouch; was it not more than a week or ten days or two weeks?
A. Oh, it might have been that long.
Q. How long was it?
A. That would be a hard matter for me to answer exactly.
Q. I do not want yyur exact answer; give us your best recollection.
A. Say a couple of days.
Q. After the protest was filed?
A. Yes, sir.
Q. That is right, is it, a couple of days after the protest was filed?
A. I could not tell exactly.
Mr. ZANE: It was afterwards?
A. Yes, sir; I went over to the city hall and told them I wanted the paving——
Q. Was it two or three days, about?
A. I could not tell exactly the amount of days. I do not want to say something I am not certain about.
189 Q. It was some days?
A. Oh, yes.

Plaintiff- rests.

W. T. BEARDSLEY, called by Mr. Whipple, testified in chief as follows:

Q. Mr. Beardsley, you were sworn?
A. Yes, sir; sworn yesterday.
Q. Did you ever see the peper which purported to be a protest and which was filed with the city recorder on March 29th, 1892?
A. Yes, sir.
Q. Were you acquainted with the names on that petition—some of them?
A. Well, I was acquainted with some of the names.
Q. Was the name of Geo. M. Kerr on that peper?
A. The name of Geo. M. Kerr, to the best of my knowle-ge and belief, was not on the peper.

Cross-examination:

Q. Was the name of John Nichols on?
A. The name of John Nichols' estate was on.

Q. Was the name of Gomer Nichols on?
A. I do not remember.
Q. What is your best recollection?
A. I do not remember that, Mr. Rogers.
Q. Give us your best recollection one way or the other.
A. I have no recollection only of names brought to my notice more particularly than others.
Q. Was the name of Geo. M. Kerr particularly brought to your notice?
A. Yes, sir.
Q. What brought it to your notice?
A. For the reason that it was not signed properly on the protest.
Q. How was it sugned?
A. Carr.
Q. Sugned George M. Carr?
A. Yes, sir.
Q. As administrator or guardian?
A. I do not remember.

190 At thie time, 10.30, council for plaintiff- commenced the opening argument, which continued until 12.30, when a recess was taken until 2 p. m. of the same day.

2 O'CLCOK P. M.

Mr. Whipple at this time, the defendant having found the original protest and withdrawals therefrom, asked permission of the court to offer the withdrawals in evidence; to which plaintiffs' council objected; and after argument and consideration the court permitted their offer, imposing as terms that costs made necessary — to the plaintiffs by reason thereof.

Mr. WHIPPLE: The defendant now offeres the following instrument in evidence and asks that it be marked. (Same was marked Def't's Ex. J. E. H.)

Mr. ROGERS: To this we object as immaterial, irrelevant, and incompetent. It does not show to have ever been signed by anybody—that is to say, the signature is not identified.

It is not shown that it ever came into the hands of any officer of Ogden city corporation. It does not purport to have ever been received by Ogden city corporation nor any agent of it. It does not purport, either upon its face or upon its back, to have ever been filed by Ogden city or any officer or agent of it. It does not purport to be signed by anybody who had authority to sign. The protest, as the evidence now clearly shows, was signed J. E. Horrocks and Ann Horrocks for 91 feet. This purported withdrawal purports to be by James E. Horrocks and not by Ann Horrocks. It purports now to be the individual act of James E. Horrocks in signing for himself and not for his cotenant, Ann Horrocks, and it is not proven to be his signature. It is not proved to have ever been received or filed by Ogden city. Therefore we say it is incompetent and im-
191 material for the reason that after a party has signed a protest and the protest had been lodged with that officer of the

municipal district as by the law it should be it is beyond the power of such person to withdraw.

COURT: I think the objection will be sustained.

Mr. WHIPPLE: I will show that it is signed by James E. Horrocks or J. E.

Mr. T. P. BRYAN, recalled by Mr. Whipple, testified as follows:

Q. I want to ask you about this paper that you have in your hands. I hand you a paper and ask if you ever saw that before.

COURT: Is that the exhibit you have just marked?

Mr. WHIPPLE: Yes, sir.

WITNESS: I have.

Q. Do you recognize it?

A. I do.

Q. What is it?

Mr. ROGERS: We object. The paper shows for itself.

Q. By whom was it signed?

Mr. ROGERS: I object. No proper foundation has been laid.

Q. Do you know that signature; do you know who signed it?

A. I do.

Q. Who was it?

A. James E. Horrocks.

Q. Was it ever filed with the city recorder?

Mr. ROGERS: I object, as there is better evidence—the records themselves.

Q. I will ask you what these figures mean—3, 29, mean—if you wrote them.

Mr. ROGERS: I object. The figures show for themselves what they mean.

COURT: He asked if you wrote them.

WITNESS: I did.

192 Q. What do they mean?

Mr. ROGERS: I object to that. They show for themselves.

COURT: I think he may answer. Take an exception.

A. It means the 29th day of March.

Q. What time in the day was that filed?

A. That was filed previous to 10 o'clock a. m.

Mr. WHIPPLE: Now I offer to read it in evidence, your honor.

COURT: You say that is his signature?

A. Yes, sir.

COURT: I think it may be received; and give the plaintiff as exception.

OGDEN, UTAH, *March 29th*, 1892.

To the honorable mayor and city council.

GENTLEMEN: After reconsidering the matter I hereby withdraw my protest against paving 25th Street district.

JAMES E. HORROCKS.

Q. Mr. Bryan, I hand you another paper and ask you if you identify that.

A. I do.

Mr. WHIPPLE: Now, as to this signature, I wish to be sworn about that. Mrs. Lewis signed it in my office. I wrote it on the typewriter.

Mr. ROGERS: I will waive his being sworn.

Mr. WHIPPLE (to witness): I will ask you if you ever saw this paper.

A. I have seen it before.

Q. Did you write these figures on that?

A. I did.

Q. What do they mean?

A. The 29th of March.

Q. Was that paper filed with you?

A. It was.

Q. At what time?

A. On the 29th of March.

193 Q. Previous to 10 o'clock a. m.?

A. Yes, sir.

Mr. WHIPPLE: I will now offer and have it marked. (Same was marked Def't's Ex. H. A. *1*.)

Mr. ROGERS: We object to the same on the ground that it is immaterial, irrelevant, and incompetent.

COURT: It may be received.

Plaintiffs excepted.

OGDEN, UTAH, *March 29th*, 1892.

To the city council, Ogden, Utah:

Will you please see that my name is stricken from the remonstrance that is being circulated opposing the city council's action in regard to the paving of 25th street? I signed the remonstrance without properly understanding its import. I am in favor of paving. I own property on 25th street along in one of the proposed districts.

Very respectfully, MRS. H. A. LEWIS.

Mr. ZANE: We add the further objection that it does not show the property in this district.

Mr. WHIPPLE: Now, Mr. Recorder, I now hand you another paper and ask you if you have ever seen that before.

A. I have.

Q. You identify it?

A. I do.

Q. Do you identify the signatures on it?
A. In what way do you mean?
COURT: Do you know the signatures?
Mr. WHIPPLE: Do you know the names on there?
A. Oh, you mean if I can identify that these signatures are of the parties that signed them?
Q. Have you seen them before?
A. I have seen this paper before with these signatures on it.
Q. Was that filed with you as city recorder?
A. It was.
Q. On what day?
A. On what day? On the 29th of March.
194 Q. At what time?
A. At 10 o'clock a. m.
Q. Do you know the signatures on it—the handwriting?
A. He was asking me the question.

Mr. ZANE: We object to it, if the court please, that neither of the signatures on this paper have been proven to be the true and genuine signatures of the names of the persons purporting to be thereon. We object to it, further, that it is immaterial and irrelevant.

Mr. WHIPPLE: I will ask you if you know these signatures and which one of them you do know, if not all. Do you know that of Mr. Krouch?
A. Let me think; give me time and I will answer it. I know the signatures of C. F. Krouch.
Mr. ROGERS: How many feet?
A. 30 feet.
A. I know the signature of G. W. Lashus.
Mr. ROGERS: 50 feet?
A. That is all the signatures I could swear to.

Mr. ROGERS: We make the further ground of objection to the paper that the paper appears to have something written upon it in a handwriting different from that of the maker of the paper; therefore appears to have been altered, and no explanation had been made as to the altered condition of the paper at this time.
COURT: I think it may be received as to these two whose signatures have been proven.
The court here made an order that all the secondary evidence with respect to the withdrawals heretofore adduced *to* be stricken out, except so far as the testimony refer-ed to the dates upon which the withdrawals were filed, which were retained in evidence.

Mr. S. C. STEPHENS called by Mr. Whipple:

Q. I now hand you a paper and ask if you know who signed the name- of S. C. and W. J. Stephens—W. J. Stephens, J. C. Stephens, and D. M. Stephens.
A. Yes, sir.
195 Q. Tell me who signed them.
A. I signed the names of S. C. and W. J. Stephens, and S. C. and D. M.

Q. Who signed the other two?
A. My brother W. J. signed his name and J. C. signed his name.
Q. You are familiar with his signature, are you, Mr. Stephens?
A. Yes, sir; that is his signature.
Q. These are their signatures, are they?
A. Yes, sir.

Cross-examination by Mr. ROGERS:

Q. When did you sign these names?
A. I signed them somewhere nigh to two o'clock in the afternoon of that day.
Q. Of the day the protest was presented?
A. Of the day the protest was presented.
Q. How did you come to sign it?
A. Frank Cannon and William Binford came to me and my brother Will. we were all three of us——
Q. Who was Frank Cannon?
A. Frank Cannon was one of the city council.

Mr. WHIPPLE: I object to that.
COURT: I think he can cross-examine as to his signature.

Q. Did you sign your name at the request of Frank Cannon, a member of the city council?
A. Yes, sir.
Q. What did he say to you?
A. We told him we had no authority to sign for anybody else; we had not consulted them. We had consulted them in signing the protest, but not in signing the withdrawal. I told him that was the way it was with me, as I had signed the other names, all except my brother W. J., in fact; they did not intend to sign the withdrawals anyway, but I told them I was in favor of fixing up 25th street, paving it, but not in paving with stone or asphaltum, but I was in favor of mecadam, and we talked with them and they said——
Q. Did he tell you that if you would sign the withdrawal that he would see that the council would pave with mecadam?
196 A. He said that he would see that the council consulted the property-owners on 25th street before they would pave it, and that they would be consulted before it was decided what to pave with.
Q. Were you ever consulted?
A. No, sir; never.
Q. You signed the name of S. C. Stephens for 21 feet?
A. Yes, sir.
Q. You had no authority to sign any other?
A. No authority to sign any other name.
Q. You signed this paper along about 2 o'clock?
A. About 2 o'clo-k he told us that they lacked about what our amount would be of having the amount that would make their majority.
Q. Where was it?

A. It was right on the Reed corner.
Q. Did he come and approach you with this paper?
A. Yes, sir.
Q. Already prepared?
A. Yes, sir.
Q. And requested you to sign it?
A. Yes, sir.
COURT: How many feet did you sign for that you had no authority?
A. 33 feet of brother- D. M., S. C., and W. J., of course I signed; we were joint owners in 65 feeet.
COURT: And W. J. you had no authority from?
A. And D. M. I had no authority from, but I signed his name.
Q. You had no authority from W. J.?
A. No.
Q. From D. M. Stephens?
A. W. J. was present at the time and signed his own, but I signed S. C. and W. J.; we were joint owners in the piece.
Q. W. J. signed his own name?
A. Yes, sir, and J. C. signed his own name.
Q. W. J. signed for himself for 71 feet?
A. He signed for himself.
Q. At that time that 71 feet?
A. 21 feet was in his own name.
Q. Fifty feet was in the name of his wife?
A. Yes, sir.
Q. Stood upon the records of the county in her name, Zilpha Stephens?
A. Yes, sir.
197 *A. Yes, sir.*
Q. At the time Mr. Cannon presented this to you Mr. Krouch has signed it?
A. I think so; there was one or two names ahead—all the names ahead—of us there was signed at the time.
Mr. ZANE: Had not yet been filed?
A. Not that I know of.
Q. It was 2 o'clock in the afternoon?
A. Yes, sir; they told us that they lacked what we had to get a majority.
Q. You do not know when it was filed?
A. No, sir.
Q. Who took it away from you?
A. Frank Cannon.
Q. He was a member of the paving committee at that time?
A. I think so; I am not sure.

(At the request of Mr. Whipple an order was here entered associating Mr. Kimball as attorney of record in the case for the plaintiff.)
Mr. KIMBALL: I offer in evidence, if your honor please, paper marked Def't's Exhibit P, purporting to be a protest against the

taxes in paving district No. 2, in Ogden city, for this purpose: In contradiction of the testimony of James E. Horrocks, Mr. Spargo, and one or two of the others whom I do not remember, to this extent: James E. Horrocks testified that he signed to this protest his own name and that of Ann Horrocks, and that he had authority to sign Ann Horrocks; Spargo testified that Mr. Morely and H. I. Griffin's name appeared on the protest. I offer it in contradiction of that testimony and also in contradiction of Mr. Kerr as to his signing in the capacity of a guardian for the Nichols heirs. That is the purpose for which I offer it. So far as that is concerned, the name of Ann Horrocks does not appear here signed by any one. The name of William Driver and the name of Griffin does not appear here, and the signature of the Nichols' are placed here by some person styling himself administrator.

Mr. ROGERS: We did not understand that the case was opened for that purpose, but only to go to the question of with-
198 drawals.

COURT: You object to it?

Mr. ROGERS: Objection will be sustained.

Exception taken by Mr. Kimball.

After some little argument the court announced that in the exercise of the court's discretion he would permit the introduction of the protest by the defendant in this case.

J. R. ELLIOTT recalled by Mr. Whipple:

Q. Major Elliott, did you hear the evidence of Mr. Stephens with regard to his signing this withdrawal at 2 o'clock March 29th, 1892?

A. I did.

Q. You may state what you know about the matter.

Mr. ZANE: We object to that; that is not covered by the ruling of the court that they should be permitted to introduce their own testimony and then contradict it.

COURT: Does not that seem to be introducing a new element entirely? I think, in the exercise of sound discretion, that the court has permitted you to go far enough on that question, Mr. Whipple.

Mrs. MARY ANN WARNER recalled and examined by Mr. Whipple:

Q. Now, Mrs. Warner, I want to ask you if you know that signature.

A. Yes, sir; I think I do.

Q. Whose is it?

A. Well, it looks like Mrs. Warner's.

Q. What is your name?

A. Mrs. J. Warner is what I usually sign.

Q. Did you authorize him to sign your name?

A. No, sir; I did not know that he had signed it; it is the withdrawal.

Q. Has any one talked with you about this since you were
199 subpœnaed?

A. No, sir.

Q. You did not know that he had signed your name at all?
A. No, sir; I did not know, sir.
Q. Were you aware at the time he signed your name to the protest that he signed it?

COURT: She signed her own name to the protest; she testified so on the stand.

Q. Is thet your name?
A. Mrs. J. Warner; yes, sir.
Q. Did you sign that?

Mr. ROGERS: We object to this. She has already testified on the stand.

Q. Did you sign that?
A. Yes, sir.
Q. This is not your signature?
A. No, sir; it appears to me as though it was Mr. Warner's.

Mr. WHIPPLE: Now, the defendant offers this paper in evidence to show the withdrawals of C. F. Krouch, S. C. and W. J. Stephens, S. C. Stephens, W. J. Stephens, J. C. Stephens, D. M. Stephens, and G. W. Lashus, and asks that it be marked.

(Same was marked Def't's Ex. W.)

COURT: It will be received to show the withdrawals.

Mr. ROGERS: We object to it on the ground that the paper on its face purports to be a forgery.

COURT: The court will overrule as to the objection.

Mr. ROGERS: Note an exception.

Mr. ROGERS: Now, as to the Stephens- we object to it for the reason it appears that it was signed long after the time called for by the notice of intention of the city council, to wit, after 10 o'clock the 29th day of March, 1892. It would be immaterial. As to any of the names of the Stephens-, except S. C., W. J., and S. C. Stephens and W. J. Stephens, we object to it on the ground that the names of the other Stephens- were not signed upon this paper by any authority emanating from them to any person whatsoever. We object to it further as to the signature of G. W. Lashus that this paper purports to have been filed on the 29th day of March, at 10 o'clock a. m. (it don't say of what year), and Mr. Lashus testified that he signed his withdra*l*al four or five weeks after the date; and as to *and as to* the Stephens- we concede that S. C., W. J., S. C. & W. J. Stephens have testified *testified* that they signed these withdrawals upon certain representations made to them after 10 o'clock of that date.

COURT: It will be received subject — -ion as to Krouch and as to S. C. and W. J. and the two together and G. W. Lashus.

Exceptions taken by plaintiffs.

Said exhibit read as follows:

OGDEN CITY, UTAH, *March 29th*, 189–.

To the honorable mayor and city council of Ogden city, Utah:

We, the undersigned, property-owners in paving district No. 2,

having signed a remonstraance against paving said district, hereby withdraw from said remonstrance our names and do hereby favor paving the same.

C. F. KROUCH.
S. C. AND W. J. STEPHENS.
S. C. STEPHENS.
G. W. LASHUS.

Mr. WHIPPLE: Now it is offered for the same purpose as to the names J. C. Stephens, D. M. Stephens, and Mrs. J. Warner.

Mr. ROGERS: To which we object as immaterial, irrelevant, and incompetent.

Objection was sustained.

201 Mr. ZANE: We object to it and the whole of it as immaterial and irrelevant and to all the withdrawals on the same ground, and take an exception to the ruling of the court.

Defense rests.

Defendant's Ex. N was handed to the reporter during the argument by Mr. Kimball and asked to be marked as above.

And the above was all the evidence adduced upon said trial.

202 PLAINTIFFS' EXHIBIT "A."

An ordinance creating paving district No. 2 and levying and assessing a special tax on the abutting property in said district to pay the costs of paving therein.

Whereas, the city council has heretofore ordered to be published in the Standard, a daily newspaper, published and printed in Ogden city, for the full period of twenty days, the following notice of intention:

Notice of intention of the city council of Ogden city of creating a district for paving and for paving and macadamizing the streets therein, and to defray the expenses thereof by local assessment.

The city council of Ogden city, situate in the county of Weber, Territory of Utah, gives notice that it intends to make the following improvements, to witness: Pave and macadamize the following streets: Twenty-fifth street, from the west line of Washington avenue to the west line of Wall avenue. This shall be known as paving district No. 2. The boundaries of the district to be benefitted and effected, are lines running 150 feet back, and parallel with the outer lines of each side of the street on each and every block, and for the full length thereof therein. The estimated cost of such improvement is $40,000.

For the payment of the costs and expenses thereof, the city council intends to levy taxes upon the real estate lying and being within said paving district, to the extent of the benefits to such property by reason of such improvements.

The city council will on March 29th, 1892, at 10 a. m. hear

objections in writing from any and all persons interested in said local assessment.

203 By order of city council,

T. P. BRYAN,
City Recorder.

And whereas, the said notice of intention was published daily continuously in said newspaper from March 9th, until March 31st, 1892, and

Whereas, in said paving district No. 2, there has not been filed written or any objections to the improvements mentioned, signed by the owners of one-half of the front feet on said Twenty-fifth street, from the west line of Washington avenue, to the west line of Wall avenue, now therefore be it ordained by the city council of Ogden city, as follows:

SEC. 1. That for the purpose of paving, 25th street, from the west line of Washington avenue, to the west line of Wall Ave., be and the same is hereby constituted a paving district, and the same shall be known as paving district No. 2 of Ogden city.

SEC. 2. That said 25th street, shall be paved from the west line of Washington avenue to the west line of Wall avenue, as follows:

With Utah sandstone blocks for ten feet out from the curb on each side of said streets, and the balance of said streets with asphaltum. The said pavement shall be paved and constructed under the supervision of the city engineer, and shall be done under contract to be let by *let by* the city to the lowest bidder for such work.

SEC. 3. That the cost of making such improvements of laying said pavement, (except the intersections of streets and spaces opposite alleys) within said district, shall be assessed upon the lots and lands abutting upon 25th street in proportion to the front feet so abutting upon said 25th street.

204 SEC. 4. A special tax of $12 per front foot upon the property abutting upon 25th street, from the west line of Washington avenue to the west line of Wall avenue, is hereby levied for the purpose of paving and making said improvements as hereinbefore provided for, and said tax shall be delinquent as follows: One-tenth in fifty days after the passage of this ordinance; one-tenth in one year; one-tenth in two years; one-tenth in three years; one-tenth in four years; one-tenth in five years; one-tenth in six years; one-tenth in seven years; one-tenth in eight years; one-tenth in nine years after the passage of this ordinance; and each installment except the first shall bear interest at the rate of seven per cent. per annum from and after the passage of this ordinance, until the same shall become delinquent; and after the same shall become delinquent, interest at the rate of ten per cent. shall be paid thereon, and such tax shall be enforced as any other case of special taxes.

The property to be effected by and upon which said tax is levied is as follows:

Lots 6 and 7, block 19; lots 1, 2, 3, 4, and 5, block 24, lots 6, 7, 8,

9 and 10, block 20 lots 1 and 2, block 23; lots 1 and 2, block 25 plat "A." Ogden City survey.

SEC. 5. That the Ogden City Street Railway Company, a corporation heretofore creating and operating an electric street railway in said district on 25th street from the west line of Washington avenue to the west line of Wall avenue, be and it is required and directed to pave all the space between its different rails and tracks on said 25th street, and a space of two feet wide on the outside of the rails on each side of the track, and also the space between the rails on all side tracks and two feet on the outside of the rails on each side of the said side tracks, at the same time the paving is done on the other parts of the said street, and the pavement to be made
205 and laid by said street railway shall be of Utah sandstone of the same kind and quality as that used by the city.

SEC. 6. That the Ogden Electric Railway Company, known as the Brinker-Henderson Company, a corporation heretofore created and now having a street railway track in said paving district, on said 25th street from the west line of Washington avenue to the west line of Wall avenue, be and it is required and directed to pave all the space between its rails and tracks on said 25th street and a space of two feet wide outside of the rails on each side of the said tracks, and also the space between the rails on all side tracks and two feet on the outside of the rails on each side of the said side tracks, of Utah sandstone of the same kind and quality as that used by the city, at the same time that the paving is done on the other parts of the said streets. That after the pavement is laid said railway companies are required and directed to keep that part of the street which it is required to pave, in good and proper repair, using for said purpose the same material that the said street is or shall be paved with and shall keep the said pavement level with the tops of the rails of the track of its railway.

SEC. 7. That George W. Jones, A. J. Warner, A. I. Stone, John Maguire, and John H. Restall, members of the city council, be and they are hereby appointed a board of equalization and review of the taxes levied under this ordinance, and upon completion of the list or lists of the property in said paving district No. 2, to be taxed, the said list or lists shall be placed in the hands of said board; and the said board shall give public notice of the completion of said lists, and shall appoint no less than five consecutive days upon which they will meet, during the usual business hours, stating in said notice the place of its meetings, and during the time specified shall keep the list or lists open to public inspection, and any person or persons feeling themselves aggrieved shall have a hearing before said board, and
206 the said board are hereby granted power and authority to make correction of any tax deemed by them unequal and unjust.

Passed March 22, 1893. Approved March 25th, 1893.

(Here follow diagrams marked pp. 207, 208, & 209.)

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

210 DEFENDANTS' EXHIBIT "N."

TERRITORY OF UTAH, } ss:
County of Weber, }

Geo. H. Durbrow, of the city of Ogden, Weber county, Utah Territory, being first duly sworn, deposes and says that he is a male citizen of the United States, over eighteen years of age; that he is the principal clerk of the printers and publishers of the Standard, a daily newspaper printed at Ogden city, in said Weber county, and has charge of all the advertisement- in said ne-spaper, and that the annexed notice has been published daily in the above-named paper for twenty times, commencing on the 9th day of March, 1892, and ending on the 31st day of March, 1892 (both days inclusive); and further sayeth not.

GEORGE H. DURBROW.

Subscribed and sworn to before me this 1st day of April, 1892.

H. M. DURBROW,
Notary Public.

[SEAL.]

211 DEFENDANTS' EXHIBIT "E."

OGDEN, UTAH, *April 4th*, 1892.

To the mayor and city council of Ogden city.

GENTLEMEN: In the matter of protests referred to me this day against the levying of a local tax for the purpose of paving in districts Nos. 1, 2, and 3, I submit the following report, after having carefully compared said protests with the record, as follows:

Protesting.

Districts No. 1:

The total number of feet owned by those protesting	2,389½
Total number of feet in district	3,960
Mrjority of feet protesting	409½

District No. 2:

Total number of feet protesting	2,315
Withdrawals from same, filed March 29th, 1892	436½
Net number of feet protesting	1,878½
Total number of feet in district	3,960
Number of feet in favor of	2,081⅓
Whole number of feet over those protesting	202½

District number 3:

Total number of feet protesting	2,021½
" " " " in district	2,640
Majority protesting	701½

Respectfully submitted.

J. R. ELLIOTT,
Special Committee.

M. GRAVES.

Accepted and placed on file.

M. CANNON.

Adjourned 4.15.

212 DEFENDANTS' EXHIBIT "B."

To the honorable mayor and city council.

GENTLEMEN: I hereby request that my name be withdrawn from the remonstrance against paving Twenty-fifth street between Washington and Wall.

Respectfully, CHARLES FOX.

Ogden, Utah, March 31, 1892.
Filed 3, 31, '92, 2 p. m.

DEFENDANTS' EXHIBIT "C."

OGDEN, UTAH, *April 2nd*, 1892.

Hon. mayor and members of the city council.

GENTLEMEN: Please erase my name from the remonstrance against paving on Twenty-fifth St. betwe-n Washington and Wall avenue-.

Yours respectfully, JOHN MAGUIRE.

Filed 3.15 p. m., April 2nd, 1892.

DEFENDANTS' EXHIBIT "D."

OGDEN, UTAH, *March 29th*, 1892.

To the honorable mayor and city council of the city of Ogden.

GENTLEMEN: Having signed a remonstrance against paving 25th street through a misunderstanding of the facts in the case as to the costs, etc., we hereby withdraw our remonstrance to said paving.

SCUDDER AND CARLSON.

Filed 1.30 p. m., 3, 31, '92.

213 DEFENDANTS' EXHIBIT "J. E. H."

To the honorable city council of Ogden city:

After reconsidering the matter, I hereby withdraw my protest against paving 25th Street district.

J. E. HORROCKS.

3, 29, 10 a. m.

DEFENDANTS' EXHIBIT "H. A. L."

To city council, Ogden, Utah:

Will you please see that my name is stricken from the remonstrance that is being circulated opposing the action of the city council in regard to paving on 25th street? I signed the remonstrance without properly understanding its import. I am in favor

of paving. I own property on 25th street and along and in one of the proposed districts.

25 feet.

Very respectfully, MRS. H. A. LEWIS.

3, 29.

214 DEFENDANTS' EXHIBIT "E. W."

OGDEN CITY, UTAH, *March 29th*, 1892.

To the honorable mayor and city council of Ogden city, Utah Territory.

GENTLEMEN: We, the undersigned, property-owners in paving district No. two (2), having signed a remonstrance against paving said district, hereby withdraw from said remonstrance our names and do hereby favor paving the same.

Names.	No. of feet.
C. F. Krouch	30 feet 4 inches.
S. C. and W. J. Stephens	65 "
S. C. Stephens	21 "
W. J. Stephen	71 "
J. C. Stephens	20 "
D. M. Stephens	35 "
Mrs. J. Warner	54 "
G. W. Lashus	50 "
	346 "

3, 29, 10 a. m.

DEFENDANTS' EXHIBIT "A."

OGDEN, UTAH, *April 1st*, 1892.

To the honorable mayor and city council.

GENTLEMEN: I hereby request that my name be withdrawn from the remonstrance against paving 25th street between Washington and Wall.

Respectfully, W. KAY.

Filed 3.25 p. m., April 2nd, 1892.

215 DEFENDANTS' EXHIBIT "P."

The common council of Ogden city.

GENTLEMEN: We, the undersigned, property-owners on 25th street between west line of Wall avenue and the west line of Washington avenue, and which is designated as paving district No. two (2), hereby protest against the levying of any local assessment against or upon our property for the purpose of paving said street within said district, and we represent to your honorable body that we

are the owners in plat "A" of Ogden city of the following property, to wit:

	Name.	Frontage on 25th St.	Block.
	D. H. Peery	Twenty-eight feet (28)	25
	S. C. & W. J. Stephens	Sixty-five feet (65)	24
	S. C. Stephens	Twenty-one feet (21)	24
	D. M. Stephens	Thirty-five feet (35)	24
	W. J. Stephens	Eighty-two feet (82)	19
	J. C. Stephens	Twenty feet (20)	19
	John Pincock	Twenty-two feet (22)	19
	D. H. Stephens	Thirty-two feet (32)	24
	Rebecca W. McKee	Seventy-five feet (75)	23
	Caleb I. McKee	Twenty-five feet (25)	19
	Charles R. Reed	Forty-five & $\frac{9}{12}$ ft ($45\frac{9}{12}$)	19
	R. A. Wells	Forty feet (40)	19
	J. H. Spargo	Forty feet (40)	25
	John Broom	One hundred and sixty (160)	25
	Joseph Morely	Thirty feet (30)	25
	Lamoni Grix	Twenty-one feet (21)	25
	C. F. Krouch	Thirty and $\frac{4}{12}$ ft. ($30\frac{4}{12}$)	24
	G. W. Lashus	Fifty feet (50)	20
	Mrs. Butterworth	Fifty-two feet (52)	20
	J. M. Major, M. Biel	Fifty-two and half (52½ ft.)	20
	Chas. Fuschs	Twenty-five feet (25)	19
	Geo. W. Murphy	Twenty-one & half (21½ ft.)	25
	Geo. W. Murphy	107 feet	20
	James Thompson	13½ feet	25
	James I. Dee	31 feet 4½ inches	25
	Mor-is Livingston	19 feet	20
	J. E. Horrocks	125 feet	25
	W. Kay	22 feet	25
	Clark, Emmett & Thompson	25 feet	20
	Jos. Clark	40 feet	23
216	Clark and Patterson	50 feet	23
	Mrs. H. A. Lewis	25 "	23
	53, 76th, and 77th Quorum of Seventies, per B. H. Goddard, secretary and treasurer	40 feet	19
	Scudder and Carlson	22 feet	20
	J. H. Carden	47 feet	23
	J. C. Armstrong	79 feet	20
	C. F. Taylor, by O. E. Hill, ag't	92 feet	24
	Emma Muns	30 feet	24

217 To the common council of Ogden city:

GENTLEMEN: We, the undersigned, property-owners on Twenty-fifth street between west line of Wall avenue and the west line of Washington avenue, and which is designated as paving district No. two (2), hereby protest against the levying of any local assessment against our property for the purpose of paving said streets within

said district, and we represent to your honorable body that we are the owners in plat "A" of Ogden city of the following property, to wit:

Name.	Frontage on 25th St.	Block.
John Maguire	22½ feet	25
Boyle and Patterson	25 feet	24
H. D. Lewis	34½	24
J. H. Watkins	21 feet	25
E. J. Watkins	20 "	25
W. M. Chapman	41 "	23
Mrs. M. E. Fitzgerald	25 "	20
C. Sorenson	17 "	25
John Nicholas, Rose Nicholas, Goomer Nicholas, Jane Nicholas, Leslie Nicholas, Geo. M. Car, administrator	132 feet	24
Job Pingree	29½ feet	20
Mrs. J. Warner	54 feet	19
Mrs. Libbie Wadmand	45½ feet	19
A. J. Morrison	25 "	20
D. H. Peery, Jr.	20 "	25
Realty Co., by D. H. Peery, Jr., ag't	62 feet	24
E. and H. Madden, by I. R. Rogers, their attorney	25 feet	23
David Evans, I. R. Rogers, & D. H. Peery, Jr.	62 "	23
I. P. Burchfield, by D. H. Peery, Jr., ag't	50 "	23

218 *Proposals, Specifications, and Contract for Curbing and Paving 25th St. from Washington to Wall Avenues, Ogden City, Utah.*

Notice to bidders.

Bidders are rwquired to state in their proposals their names, place of residence, and post-office address; also the names and similar addresses of all persons interested with them therein.

Bidders are required to thoroughly examine the specifications, form of proposals, and form of contract, and if their be *be* any doubt or obscurity as to the meaning of any part of the same, they are requested before making their proposals, to ask in writing for an explanation, and said explanation shall be given in writing. If after the proposals are delivered to the paving committee, any difference of opinion shall arise as to the true intent and meaning of any part of the specifications, the decision of the city engineer shall be final and conclusive and binding on all parties.

Bidders are warned that bids that are deficient in either of the following requirements, will be rejected as informal:

a. All bids and their accompanying statements, must be made

upon the printed blanks provided therefor by the city engineer and bound therewith.

b. No bids will be received if detached from the package in which it is bound; nor must any of the accompanying papers be detatched therefrom, but the entire package must be unbroken and in good order when the bid is deposited.

219 *c.* The prices must be stated in the respective columns provided for the same.

d. Each proposal must be accompanied by a certified check for $3,000, as a guaranty of good faith, which is hereby agreed as liquidated damages and forfeited to the city of Ogden if such proposal is accepted and the contract awarded, and the bidder fail to enter into contract in the form hereinafter prescribed, with at least two sureties within ten days after such award is made.

e. Samples of the materials to be used in connection with the proposed work shall be deposited with the paving committee at least two days preceding the time appointed for opening the bids, and each sample shall be plainly labelled to show the name of the bidder, the date the sample was deposited, and the place from which it was procured.

No proposals will be considered unless samples have been previously deposited.

All samples will be retained by, and shall be the property of the city, whether bids are accepted or not.

f. The city of Ogden reserves the right to reject any and all bids.

Approximate Quantity of Work to Be Done.

Grading (included in price for square yard for pavements), cubic yards	13,000	
Curbing (sand foundation and packing), lineal feet	3,500	
Flagstone in cross-walks, same foundations as adjoining pavement	570	sq. ft.
Stone-block pavement (sand or gravel foundation)	9,900	sq. yds.
220 Sheet asphalt or bituminous rock pavement (concrete foundation), sq. yards	8,800	

Bidders are warned that this is an approximate estimate, and that the contractor will be paid for the actual amount of work done.

Proposals.

OGDEN CITY, UTAH, *May 8th*, 1893.

To the paving committee, Ogden, Utah:

The undersigned propose to grade, curb, and pave with stone blocks and asphaltum or bituminous rock, and to lay cross-walks of the following streets, to wit, Twenty-fifth street from the west side of Washington avenue to the west side of Wall avenue, Ogden, Utah, and to furnish all the material and labor necessary to com-

plete the same in proper and workmanlike manner, and according to the plans on file in the city engineer's office, and upon the terms and conditions of the specifications and form of contract and bond hereto attached, and in conformity with the rules and regulations of the city, and under the direction of and to the full and complete satisfaction of the paving committee and the city engineer of Ogden city, Utah, at the following-named price, to wit:

221 Nature of work.	Price expressed in words.		Price expressed in figures.	
	Dollars.	*Cents.*	*Dlrs.*	*Cts.*
Curbing:				
Five-inch sandstone, per lineal foot	One dollar	Fifteen cents	$1	15
Flagstone in cross-walks, sandstone, per square foot		Seventy-five		75
Paving:				
With sandstone blocks, per square yd	Three dollars		3	00
With refined asphaltum, per sq. yd	Three dollars		3	00
With bituminous or asphaltic rock, per square yard				

222 As a guarantee of good faith and responsibility of this proposal I enclose a check on an Ogden bank of known standing in the sum of three thousand ($3,000) dollars. Said check is payable to the order of the treasurer of Ogden, and if this proposal is not accepted within thirty days of the date hereof it shall be returned to the undersigned.

If the proposal is accepted and the undersigned shall not respond to notice of acceptance and enter into contract with the city of Ogden within ten days the said check shall be cashed and paid into the treasury of the city of Ogden as liquadated expenses for the failure to comply with the terms of this bid.

The undersigned further proposes and agree to fully complete all of the said work contemplated in this bid on or before the first day of November, A. D. 1893.

The following are the names and places of residence of the sureties offered as a guaranty in connection with this proposal:

Theo. Robison, of Ogden, Utah.
H. W. Smith, of Ogden, Utah.
Firm name, I. G. Wilkerson.

Individual Names and Places of Residence.

Name, —— ——.
Place of residence, ——.
Name, I. G. Wilkerson.
Place of residence, Ogden, Utah.
Name, —— ——.
Place of residence, ——.

223 *Specifications.*

1. Grading.—Grading shall include the removal of all earth, stone, loose rock, clay, shale, cement, hard-pan, boulders, solid rock, and all other material that may be encountered or required in preparing the streets for curbs and pavements, and shall include also, all filling, trimming, shaping, picking down, refilling, surfacing or other work, and all material that may be necessary or requisite in bringing the surface of the street to the subgrade and shape required and of maintaining the same in perfect condition until the curbs shall have been set and the pavement laid, and no compensation shall be allowed the contractor for the work of grading; it being understood and agreed that the cost thereof shall be included in the contract price for the curbs and pavements.

2. All materials resulting from, or required in the work of grading shall be hauled by the contractor to or from any place the paving committee and city engineer may direct, and when hauled a distance to exceed 1,000 feet, the contractor shall be paid at the rate of one cent per cubic yard for each 100 feet so hauled in excess.

3. Where filling is necessary to bring the street to the required grade, it shall be done in layers of not more than six inches in depth, and each layer shall be thoroughly rolled, as the paving committee and city engineer may direct.

4. Where cutting is necessary to bring the streets to the required grade or surface, the plow point must not in any case pene-
224 trate below a line three inches above the surface in which the street is being graded. The remaining three inches to be dressed off with hand tools only.

5. Where mud or objectionable material of any kind is encountered, it shall be taken out below subgrade, and replaced with gravel as the paving committee and city engineer may direct, and at the expense of the contractor.

6. The road-bed shall be brought to a subgrade or surface the required thickness of the proposed pavement and its foundations, below the established grade of the street and shall be finished in the most perfect manner, so as to be paral-ell with and in every way to conform in shape to the surface of the finished pavement. The ground shall first be brought to an approximate finish three inches above subgrade, and then shall be thoroughly rolled with a roller weighing not less than ten tons, after which it shall be trimmed, rolling and retrimming to be continued until the subgrade is completed to the satisfaction of the engineer.

7. Such portions of the street as cannot be reached by the roller shall be tampered by the contractor without compensation.

8. The contractor shall do such extra grading as may be required by the paving committee and the city engineer, at street and alley intersections, and at the end of pavement outside of area paved. Ordered to be done to make a safe passage for vehicles and drainage to and from to surface of the pavement of the natural surface of the

adjoining streets or alleys, and will be paid for at the rate of 25 cents per cubic yard. Subject to haul as specified in section (2).

9. All rolling done in connection with the work of grading shall be performed by the city and without cost to the contractor,
225 but the city will not in any way assume any liability or damage or loss to the contractor from its neglect to do the rolling so that the contractor may finish the surface of the street, and in case of wet weather or soft or muddy ground, making the use of the roller unsafe or impracticable, the rolling will not be undertaken, before such time as the paving committee and city engineer, may deem advisable.

Curbing.

1. Curbing shall be of the best quality, Utah sandstone cut in blocks of regular form five inches in thickness, not less than twenty inches in depth, nor less than thirty-six inches in length, and will be paid for by the lineal foot, at the price named in the contract, and will be measured along the outer upper edge of the finished curb, only.

2. The contract price per lineal foot for curbing shall include all cutting, dressing and setting as well as all grading foundations and other work necessary to complete the curb, and shall include all expenses direct- or indirectly connected with the proper performance of the work and of maintaining the same in perfect condition until it shall have been approved by the city engineer, and accepted by the paving committee.

3. The face of all curbstones shall be dressed smooth and even to a depth of fifteen inches, and the back to a depth of not less than three inches below the top, all stones must be dressed to a uniform thickness, and must be entirely free from seams, fractures, checks or pockets, and none shall be wedged-shape- or otherwise defective.

226 4. Curbstones for corners and to form gutters shall be cut to such shape and dimensions as the paving committee and city engineer may direct and no additional price will be paid for curbing which may require special dressing for channels to admit gutter plates, or similar work, but the cost of all such dressing and setting shall be included in and paid for at the contract price per lineal foot.

5. The ends shall be dressed smooth, so as so make close-fitting joints throughout the full thickness of the stone for at least one foot in depth from the top of the curb, and all joints shall be close fitting not to exceed one-quarter of an inch, and must be made in proper and workmanlike manner.

6. Every stone must be cut square, and must be neatly bush-hammered to a uniform plane having a rising pitch of one-eig-th inch in five inches, to make it conform to the sidewalk surface. The upper outer edge shall be rounded to a one-half-inch radius.

7. The stone will be inspected when delivered on the streets, and further inspected as it is being set, and any defective stones will be rejected whether it has been set or not, and if set, it shall be immediately replaced by a good one at the expense of the contractor.

8. The curbstones shall be set on a foundation of clean coarse sand or fine screened gravel not less than six inches in depth below the deepest stone and shall be backed up with not less than six inches of similar material to within six inches of the top of the curb. The sand or gravel shall in all cases be thoroughly tamped.

227 9. All curbing must be set with plumb faces and true to both line and grade.

Stone-block pavement.

1. The stone-block pavement will be paid for by the square yard at the price named in the contract, and will be measured after the pavement shall have been laid, only.

2. The contract price per square yard pavement for stone pavement shall include the necessary grading, the preparation of materials for, the foundation, the grouting, and all other work and expenses direct or indirect connected with the proper performance of the work and of maintaining the same in perfect condition until it shall have been fully approved by the city engineer and accepted by the paving committee.

3. Stone for the pavement shall be of the best quality Utah sandstone of uniform fine grain and texture; free from laminations and faults of every nature.

4. Soft or weather-worn stone from the surface of the quarries will not be accepted.

5. Stone for pavement shall be neatly cut into blocks of the following dimensions: In lengths not more than twelve nor less than eight inches; in width, not more than four and one-half nor less than three and one-half inches and of a uniform depth of seven inches. The blocks are to be split and dressed so as to *to* present regular and true surfaces on all sides with straight edges on top, bottom and sides. All sides of the blocks must be free from

228 depressions or projections and all blocks whose faces vary more than one-half inch from rectangular shape will be rejected.

6. The pavement shall be laid on a foundation of well-compacted clean coarse sand or fine screened gravel.

7. The paving blocks shall be carefully and skillfully laid on edge upon the foundation of sand or gravel, and in straight rows at right angles to the line of the streets, care being taken that the blocks in the same row shall be of the same width, and those in the adjoining rows set so as to break joints by a space of not less than two inches, so that when thoroughly rammed they will be brought to the exact grade, and give the desired form to the finished surface. Both side and end joints shall generally be one-half inch in thickness.

8. —all street intersections blocks shall be laid in diagonal courses so that in no case will they be parallel to the line of travel, and in cross-walks and gutters the blocks shall be laid to form such surface as the paving committee and city engineer may direct.

9. The freshly laid stone pavement shall be kept dry and be immediately covered with fine, clean, hot gravel, not larger than one-fourth inch in any dimension in proper quantities, and raked until all joints become filled therewith. The paving blocks shall be then carefully and thoroughly rammed one or more times as may be directed, with a paver's hammer weighing from seventy to eighty pounds (no iron of any kind on its lower surface being allowed to come in contact with the pavement) until no further settling occurs under the ramming and a firm unyielding bed with uniform surface and proper grade is secured.

229 10. While being rammed the joints shall be kept well filled with clean fine screened hot gravel of a size above described.

11. Any paving blocks, footwalks, etc., which do not conform to the exact grade, shall be taken up, reset, rerammed, etc.

12. The paving cement shall be obtained by the direct distillation of coal tar and the residium thereof, and shall be of a consistency ordinarily numbered five and six at the manufactory.

13. No less than three and one-half gallons of cement to each square yard shall be required. This quantity must be brought upon the work and whatever may remain after the completion of the work will be the property of Ogden city, and shall be hauled to such place in the city as the paving committee may require.

14. Immediately after the final ramming the gravel shall be swept out of the joints to a depth of one-half inch from the top of the pavement and the joints poured full of paving cement at a temperature of 300 degrees Fahrenheit (to be determined by the proper guage or indicator placed upon the tank used in the street and of a proper consistency to be approved by the engineer) until they will receive no more, and joints are filled flush with the surface of the pavement.

15. Special care shall be used in filling all joints to effectually prevent leakage of water into the sand or gravel foundation. All joints to be carefully filled to the top and refilled such number of times thereafter, as may be directed by the engineer before adding the top dressing.

16. Dry, hot, clean gravel not larger than one-half inch in any dimension, shall be poured along the joints filled with paving cement as before described and shall be consolidated by tamping with a light rammer.

230 17. While the paving pitch is still hot, dry, coarse sand or gravel of approved quality shall be spread very thinly over the entire surface of the stone pavement, which with all accumulations shall afterwards be removed from the pavements at such time and such place as the city engineer shall direct, and the pavement left clear for inspection.

The blocks will be inspected after they are brought on the line of the work, and all blocks which in quality and dimensions do not conform strictly to these qualifications will be rejected and must be immediately removed from the line of work.

The contractor must furnish such laborers as may be necessary

to aid the inspector in the examination and the culling of the blocks, and in case the contractor neglects or refuses to furnish said laborers, such laborers, as in the opinion of the city engineer may be necessary, will be employed by said engineer and the expense thus incurred will be deducted and paid out of the money then due or which may thereafter become due to said contractor under the contract to which these specifications refer.

The contractor agrees to keep the pavement in continuous good repair for a period of two years from and after the date of its completion without cost to the city, and it is expressly understood and agreed that the city engineer shall not finally approve nor the paving committee finally accept the work before the expiration of that time, and then only in case it is in perfect condition.

231 Concrete foundations.

1. Concrete foundations, six inches in thickness shall be laid under all asphaltum pavements, and no compensation shall be allowed the contractor for such foundations, it being understood that the contract price for the pavement shall include the cost of the foundation upon which it rests. But the contractor shall put in such extra concrete as the city engineer and paving committee may require, and in such places and in such form as they may designate. For all such extra concrete the contractor shall be paid at the rate of $6.50 per cubic yard.

2. The sand used for concrete shall be clean, sharp and free from all dirt or loam, dry, and when necessary, thoroughly screened.

3. The cement used must be of the best quality Portland cement, or if natural cement is used, it must be equally good. Cement shall be tested and approved by the engineer before being used.

4. Concrete, when Portland cement is used, shall be composed of one part cement, three parts of clean sharp sand, and five parts of broken stone by measure.

5. Concrete, when natural cement is used, shall be composed of one part cement, two parts of clean sharp sand, and three parts of broken stone or gravel by measure.

6. The contractor must submit the cement for inspection and testing upon its arrival at the work and at least fifteen days before desiring to use it, and only such shall be used as has been ordered and approved by the engineer.

7. The cement must be thoroughly protected from moisture until used, securely covered and placed on a wooden platform, floor
232 or blocking raised from the ground.

8. The cement and sand must be thoroughly mixed dry in a tight box, and then made into mortar with the least possible quantity of clean water.

9. The thorough mixing and incorporation of all materials will be insisted upon. If mixed by hand the dry cement and sand shall be turned over and mixed not less than six times with shovels by skilled workman before water is added. After adding the water the paste will be again turned over and mixed by skilled workmen not less than three times before it is used.

10. Tight mortar boxes shall be provided for by the contractor and no mortar or concrete shall be made except in such boxes.

11. All mortar shall be made fresh for the work in hand, nor shall more be mixed than can be used at once. No mortar nor cement which has perceptibly begun to set shall be used.

12. Broken stone shall consist of clean, angular pieces of sound durable rock of a quality acceptable to the paving committee and city engineer, and of a size, that all shall pass in any way through a ring two and one-half inches in diameter.

13. Broken stone, immediately before being used in making concrete, shall be thoroughly drenched with water, but shall not contain any loose water in the heap.

14. Concrete shall be composed of mortar and broken stone in the proportion and mixed as hereinbefore described. The whole mass shall be thoroughly turned over and mixed until every particle of broken stone is completely covered with mortar, using only sufficient water to secure proper incorporation of the ingredients. If not mixed with machinery, the concrete material will be turned over and mixed with shovels by skilled workmen upon a
233 water-tight platform of sufficient size, not less than four times before being used.

15. The proportions given are intended to form a concrete in which the cement mortar shall be sufficient to fill all the void spaces with mortar in excess. The right is reserved to the engineer to change the proportions of the cement, sand and broken stone to attain this result, without additional compensation therefore.

16. The whole operation of laying and mixing the concrete must be done as quickly as possible and by a sufficient number of skilled workmen to insure completion before any setting of the cement can occur. It shall be placed in proper position and then rammed with wooden rammers, until it is thoroughly compacted, and until mortar flushes to the surface, and no voids are left, which surface shall be two and one-half inches below the top of the finished pavement, and exactly parallel thereto.

17. No carting or wheeling will be allowed on the concrete except on planks laid down for the purpose, and all street and alley crossings shall at once be full planked for passage of vehicles.

18. When connection is made with any layer already set or partially set, the edge must be broken down and made wet so as to secure a perfect joint.

19. The whole operation of mixing and laying each batch of concrete shall be done as expeditiously as possible, and it shall be covered with one or two inches of sand for ten days before the asphalt shall be laid thereon, and the contractor shall keep the same moist and protect the surface by means of fencing and otherwise.

234 20. If any batch of concrete is improperly made or has begun to set before it is put in place, such batch shall not be used, and shall at once be removed from the work.

21. No concrete shall be laid when the temperature at any time during the day or night falls below 35 degrees Fahrenheit.

Asphalt pavement.

1. The asphalt pavement will be paid for by the square yard at the price named in the contract, and will be measured after having been laid only.

2. The contract price per square yard shall include the necessary grading; the concrete foundations and all other work, and all expense direct or indirect connected with the proper performance of the work of maintaining the same in a perfect condition until it shall have been fully approved by the city engineer, and accepted by the paving committee.

3. The asphaltum pavement may be made either from refined asphaltum or from bituminous or asphaltic rock, and shall in either case be two and one-half (2½) inches in thickness, after final compression, and shall be supported by a concrete foundation six (6) inches in thickness.

4. All refined asphaltum used shall be equal in quality to the best Trinidad, and of a uniform standard of purity, and shall be entirely free from mixture with any of the products of coal-tar.

235 5. All bituminous or asphaltic rock used shall be equal in quality to that from the Swiss mines at Val de Travers, and shall contain not less than ten (10) per cent. of asphaltum, and shall be entirely free from organic substance of any kind.

6. All sand used shall be clean and entirely free from earthly matter of any kind. The particles shall be of such a size that none will pass a No. 80 screen, and all shall pass a No. 10 screen.

7. All carbonate of lime used shall be of such degree of fineness that 16 per cent. of its entire weight shall be an impalpable powder and the whole of it shall pass a No. 20 screen.

8. If refined asphaltum be used, it shall be prepared as follows:

Asphaltum, 100 parts,

Heavy petroleum, 17 to 20 parts.

9. The asphalt cement made in the manner above described, will be mixed with other materials in the following proportions of weight, namely:

Asphaltic cement	12 to 15 parts.
Sand	83 to 70 parts.
Pulverized carbonate of lime	5 to 15 parts.
	100 100

10. The mixture of sand and the asphaltic cement shall be heated separately to about 300 degrees Fahrenheit. The pulverized carbon of lime, while cold, will be mixed with the hot sand in the required proportions and then mixed with the asphaltic cement at the required temperature, and in the proper proportions, in a suitable apparatus so as to effect a thoroughly homogeneous mixture.

236 11. If bituminous or asphaltic rock be used it shall be prepared as follows:

The lumps of rock shall first be reduced to a powder by grinding

or by means of steam, after which it shall be heated to a temperature of about 300 degrees Fahrenheit, and then mixed until the whole mass shall have become uniform throughout.

12. The pavement mixture prepared in a manner as above indicated shall be brought to the ground at a temperature of not less than 250 degrees nor more than 300 degrees Fahrenheit, and if the temperature of the air be less than 50 degrees, a canvass cover shall be provided for use in transit. It shall then be carefully spread by means of hot iron rakes in such a manner as to give a uniform and regular grade and of such depth that, after having received its ultimate compression, it will have a net thickness of two and one-half inches. This depth will be constantly tested by means of gauges furnished by the city. The surface will first be compressed by hand rollers, after which a small amount of hydraulic cement must be swept over it, and final compression be effected by means of a heavy steam roller, which shall be continually used for not less than five hours for each one thousand square yards of surface. Foreign matter of any kind must be excluded from the mixture.

13. Samples of pavement mixture shall be furnished to the city engineer whenever required.

14. Whenever the asphaltum pavement is laid adjacent to stone-block pavement, the border row of stone paving blocks shall be placed so as to form a toothing or notched line, into which the asphaltum pavement shall be keyed.

237 In cross-walks the pavement shall be laid to form such surface as the city engineer and paving committee shall direct, and it shall be made to fit neatly about all openings, projections or other irregularities.

15. Between curb lines of all intersecting streets, and between building lines of all intersecting alleys not paved, the outer ends edges of all the paving shall be finished against a three-inch oak plank set upon edge, in not less than three lengths on streets, and not more than one length on alleys, each sixteen inches in depth, extending to the full width of the paved street, alley; top edge of plank shall be neatly adzed off to conform to the surface of the completed paving. Planks to be backed up behind with broken stone as shown on plans. Broken — used behind the oak planking shall be sound, hard durable stone, acceptable to the engineer, so broken that no stone shall be larger in any dimension than six inches, nor smaller than two inches. The stone will be laid as shown on plan, well rammed and the earth replaced upon the top of the stone, and well consolidated to make a smooth solid junction between the pavement and the natural surface of the intersecting street or alley.

16. The contractor shall keep the pavement in continuous good repair for a period of five years from and after its completion without cost to the city, and it is expressly understood and agreed that the city engineer shall not finally approve nor the paving committee finally accept the work before the expiration of that time and then only in case that it shall be in perfect condition.

238 Footwalks.

1. Flagging used for footwalks shall be of the same kind and quality of stone as required for paving blocks, and shall fulfill all the requirements described under specifications for stone-block pavements.

2. Footwalks shall be laid at the street and alley intersections that may be designated by the paving committee and city engineer.

3. Each line of footwalk shall be of a uniform width of sixteen inches, and a uniform depth of seven inches, and in lengths of not less than thirty-six inches when dressed.

4. Each line shall be laid at right angles with the line of the street or alley, unless otherwise directed, in perfect line and to the proper crown upon a cushion of clean, sharp sand or gravel six inches in depth. The joints in one walk shall not be opposite those in the companion walk, but shall be broken as nearly opposite the opposing stone as possible. The surface of the flagstone shall project one-half inch above the adjoining pavement.

5. The spaces between the line of footwalks shall be between two and four feet as the city engineer may direct.

6. The upper surface of the stones shall be perfectly true and out of wind, and if necessary shall be dressed so as to show no inequalities exceeding one-quarter of an inch. Ends and sides shall be squared and dressed for the full thickness of the stones.

7. No allowance shall be made for cutting stones to fit the street railway tracks or other construction.

8. The footwalk stones shall be well settled into place upon the sand by ramming with a paver's hammer, heretofore described.

239 9. All joints shall be one-half inch in width and shall be filled with hot gravel and paving cement as heretofore described.

10. The paving between lines of footwalks shall be considered as so much paving, and shall be measured and paid for as such.

Measurements shall be made upon the basis of the lineal foot of footwalk, sixteen inches wide, actually laid, measurements to be made along the center of each line of footwalk.

240 *Contract.*

This agreement made and entered into this — day of ——, 189–, between Ogden city, a municipal corporation under the laws of the Territory of Utah, the party of the first part hereinafter called the city, and Lucius G. Wilkerson, of Ogden, Utah, the party of the second part hereafter called the contractor.

Witness-, that the said contractor having been awarded the work of grading, curbing, paving Twenty-fifth street from Washington avenue to Wall avenue in Ogden city, in accordance with the proposal therefor, which is bound herewith, and for and in consideration of the premises and of the covenants and agreements, and of the payments hereinafter mentioned to be made and performed by the city, hereby covenants and agrees to and with the city to undertake and execute all of the said named work in a good substantial

and workmanlike manner, and to furnish all the materials, tools, labor and all other things necessary to perform and complete the work, ready for use, in strict accordance with the attached specifications and under the penalty expressed in the attached bond, bearing even date herewith, which are hereby declared and accepted as essential parts of this agreement, and to accept and receive as full compensation therefor the following-named prices:

Nature of work.	Dollars.	Cents.
Curbing:		
Sandstone, per lineal foot	1	15
Flagstone in cross-walks, sandstone, as per square foot		75
Paving:		
With sandstone block, per square y'rd	3	00
With refined asphaltum, per square yard	3	03
With bituminous rock or asphaltic rock, per square yard		

It being expressly understood and agreed that the above prices shall include all materials, labor, tools and all other things and all expenses direct or indirect, connected with the proper performance of the work and of maintaining the same in perfect condition until the work shall have been finally approved by the city engineer and accepted by the paving committee.

2. It being also understood and agreed that the contractor shall not assign or sublet the whole or any part of this contract, except only for a supply of material and tools without having first obtained the written consent of the paving committee and city engineer of Ogden so to do, and in case such consent is given it shall in nowise release the contractor from responsibility, but he shall be held in all respects accountable the same as if no consent had been given.

3. The contractor agrees to provide an ample supply of suitable appliances and to furnish the best materials of every kind for the thorough and expeditious execution of the work and to provide every other necessary thing necessary for executing and completing within the time stipulated, the whole of said work herein agreed to be done.

4. All materials used in the work shall correspond substantially with the samples which have been deposited in connection with the contract.

242 5. The work shall be done in strict conformity with the attached specifications and with such lines, levels, stakes, maps, and drawings, and with such verbal instructions as shall from time to time be given by the paving committee and city engineer, or any authorized inspector, for the guidance and direction of the contractor.

6. No materials of any kind shall be used before being inspected and approved by the paving committee and city engineer or by an authorized inspector; but failure or neglect on the part of said officers to condemn or reject inferior material or work shall not be

construed to imply an acceptance of such work or material should its inferiority become evident at any time prior to the final approval of the work by the city engineer or the final acceptance of the same by the paving committee.

7. The contractor shall do such extra work in connection with the work herein contracted to be done as the city engineer and paving committee may direct, and if it shall be of a nature for which no price is stated in this contract, then the price therefor shall be fixed by the city engineer, and if it shall be of a nature for which a price is stated in this contract, then the contractor shall be paid such contract price and no other price therefor. But no allowance for extra work of any kind will be made unless ordered in writing and signed by the city engineer and the paving committee.

8. All work shall be done in sections as the paving committee and city engineer may direct. Before commencing work on any section the contractor shall have on hand all the material necessary to complete the work in such section. The material after it shall have been inspected and tested, shall be placed in neat piles on the sidewalk or such other place as shall be designated by the city
243 engineer and paving committee, but never within ten feet of any fire-hydrant, nor within one foot of any water or gas stop, and always in such a manner as to preserve a safe passage along the sidewalk and also between the roadway and each building. Upon the completion of any section, the contractor shall at his own expense clean up and remove from said section all refuse material of any kind resulting from the work.

9. After inspection shall have been made and all rejected material removed from the work and the accepted material piled as aforesaid, the contractor may proceed with his work.

10. During the execution of the work, the contractor will be entitled to the use of all the space between the curb and the center line of the street. Provided, that where a street railway is constructed sufficient room shall be left for the safe operation of the cars thereon.

11. Unless given special permission by the paving committee and city engineer in writing so to do, the contractor shall not obstruct both sides of a street at the same time, but shall leave one side open and free for travel, and shall in all cases maintain safe passageways, and shall erect and maintain good and sufficient guards, barricades and signals at all unsafe places, at or near the work, and shall do all other reasonable things to prevent accident or loss of any kind.

12. The contractor shall *prevent* from damage, all water, sewer, gas, steam, or other pipes or conduits, and all hydrants or other property that is liable to become displaced or damaged by reason of the execution of the work.

13. The work shall commence within ten days after the date of this agreement, and shall be completed on or before the first day of November, A. D. 1893. Time and punctuality shall consti-
244 tute an essential part of this agreement, and the contractor agrees that for each and every day that the work shall remain unfinished from and after the date herein fixed for its completion, the city shall deduct and retain out of the money which may be due

or become due to the said contractor under this agreement, the sum of forty dollars; which said forty dollars per day is, in view of the difficulty of estimating such damages hereby agreed upon, fixed and determined by the parties hereto as the liquidated damages that the city will suffer by reason of the failure of the contractor to complete the work within the time agreed.

14. The contractor shall not be entitled to any claim for damages on account of hindrance or delay from whatever cause whatever, but if occasioned by any act or omission on part of the city, such hindrance or delay may entitle the contractor to an extension of time in which to complete the work, which shall be determined by the city engineer and paving committee. Provided, that the contractor shall give notice in writing of the cause of such detention.

15. In case the pavement completed under this contract shall be removed before it shall have been finally approved by the city engineer and finally accepted by the city council, (which includes the time of guaranty) for the purpose of laying or repairing any gas, water or sewer pipes, or for any other purpose, by parties acting under permits of the city, the contractor, when required by the city so to do, shall restore such pavement at the original price per square yard for the same plus 25 per cent. and upon failure so to do the city may proceed to do the same, and charge the costs thereof to the contractor, with 25 per cent. added, which additional charge of 25 per cent. it is hereby agreed shall be liquidated damages for such neglect of the contractor.

245 16. The city shall have the right to make any alterations that may hereafter be determined upon as necessary or desirable, either before or after the commencement of the work, by defining them in writing; and in case such alterations increase or diminish the approximate quantities, as stated in the notice to bidders, then the contractor shall be paid for the work actually done at the contract rates herein specified, and such alterations shall not under any circumstances be construed as constituting, and shall not constitute a claim for damages, nor shall any claim be made on account of any anticipated profits on the work that may be altered.

17. In all operations in connection with the work embraced in this contract, the contractor will be held responsible for any failure to respect, adhere, and comply with all local ordinances and laws controlling or limiting in any way the action of those engaged upon the work or affecting the materials or the transportation or disposition of them, and the contractor hereby assumes all liability for and agrees to i-demnify the city against all loss, cost or damage for or by reason of any liens, claim or damages for materials from laborers or others, and from any damage arising from injuries sustained by workmen or other persons by reason of accident or otherwise, and from damages sustained by depositing materials to public injury, or to the injury of any person or corporation, or resulting from the use of any patented material, implement or process which may be employed in executing the work under the contract, including costs and expenses of defense. Provided, that he shall be notified of the bringing of suits in such cases, and be permitted to defend the same, and it shall

be lawful to withhold final payment on this contract so long as it shall seem necessary for the i-demnity of the city.

246 18. If it at any time *it* shall appear by report from the paving committee and city engineer that the contractor has failed to pay the laborers employed upon the work, or for material used therein, the city may withhold from the money which may be due or become due to the contractor under this agreement, such amounts as may be necessary, and may apply the same to pay for such labor or for such material, and deduct the amount from final estimate of the contractor.

19. Partial estimates of the work done shall be made by the city engineer on the last of each calendar month, and 85 per cent. of the contract price shall be retained by the city until the whole work contracted for shall have been completed.

20. All the estimates before being paid, shall be certified to by the city engineer and approved by the paving committee.

21. Any questions, differences or controversies which may arise between the city and the contractor under or in reference to this agreement and the specifications or the performances or non-performances of the work to which they relate, shall be referred to the city engineer, and his decision shall be final and conclusive to both parties.

22. Upon completion of the work and its acceptance by the city engineer and paving committee, and approved by the mayor and city council, ninety per cent. of the whole cost of said work, less the sum of all previous payments, shall be paid to the contractor, and the remaining ten per cent. of the final estimate may be invested in Ogden City bonds, or in such other interest-bearing bonds as the contractor may select, subject to the approval of the city through its mayor and city council, said bonds to be deposited with the treasurer of Ogden city, who shall hold or expend the same as may be necessary during the period of the guarantee covering the work done under this agreement.

247 23. Upon the expiration of the guaranty of the several kinds of work, the proper proportion of the unexpended bonds, if any which then remains in the hands of the treasurer, shall be subject to the order of the contractor, and the interest coupons as they become due and payable, shall be detatched from the bonds by the treasurer, and turned over to the contractor, who shall receipt to the treasurer therefor, provided, that the said interest coupons shall not be delivered up to the contractor except upon the presentation of a certificate from the city council and city engineer, showing the requirements of the guarantee for maintenance, have been fully complied with.

24. It is understood and agreed that the city council and engineer of Ogden city shall be the sole judges of repairs during the period of guarantee under this contract, and upon a written notice from the city council and engineer to the contractor, he shall at once make the necessary repairs. If the contractor fails to comply as requested, then the city council shall have the right to make such repairs, and their order on the city treasurer for means to pay the

cost thereof, shall be sufficient authority for him to expend such portion of the funds deposited with him for this purpose as may be required.

25. This contract with all its forms, specifications and stipulations shall be binding upon the heirs, executors, administrators, successors and assigns of the respective parties.

In witness whereof the said parties of the second and third parts have hereunto set their hands and seals respectively; and Ogden city executes this contract by its mayor, attested by its recorder under its seal, this 12th day of May, 1893.

——— ———. [SEAL.]
L. G. WILKERSON. [SEAL.]

Approved:
R. C. LUNDY,
Mayor of Ogden City.

Attest: C. S. RAPP,
City Recorder.

248 *Bond.*

Know all men by these presents that we, L. G. Wilkerson, as principal, and Theo. Robinson and H. W. Smith, as sureties, are held and firmly bound unto the said city of Ogden, a municipal corporation, in the penal sum of fifteen thousand dollars, lawful money of the United States; for the payment of which, well and truly to be made, we hereby bind ourselves and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Witness our hands and seals this 12th day of May, A. D. 1893.

The condition of the above obligation is such that whereas the said L. G. Wilkerson did on the 12th day of May, 1893, enter into a contract with said Ogden city for the grading, curbing, and paving of Twenty-fifth street from the west side of Washington avenue to the west side of Wall avenue, in said Ogden city:

Now, therefore, if the said L. G. Wilkerson shall faithfully perform said contract and shall make payment in full to all laborers and mechanics for labor that shall be performed upon said work and in the execution thereof (said contract being referred to as a part of this bond for greater certainty), then these presents shall become void; otherwise to remain in full force and effect.

THEO. ROBISON. [SEAL.]
H. W. SMITH. [SEAL.]

249 *Affirmation of Sureties.*

TERRITORY OF UTAH, } ss:
County of Weber, }

Theo. Robison and H. W. Smith, the sureties whose names are subscribed to the foregoing bond, being severally duly sworn, each for himself says that he is a resident and freeholder of the county of Weber, Territory of Utah, and that they severally own

real property in the county of Weber in double the amount of their liability on all bonds on which they may be surety to the city and on and above all liabilities, obligations, and exemptions; that they or either of them have no interest, directly or indirectly, in the work for which said bond is entered into, and that neither of them hold any official position under or in connection with the city.

THEO. ROBISON.
H. W. SMITH.

Sworn and subscribed to before me this 12th day of May, A. D. 1893.

J. S. BECKWITH,
Notary Public.

250 *Specifications for Paving 25th Street from the West Line of Washington Avenue to the West Line of Wall Avenue.*

The work shall be divided into the following classes, and the council reserves the right to award the work of the various classes to separate contractors:

1st. Excavation.
2nd. Curbing.
3rd. Stone paving.
4th. (*a*) Asphalt paving or (*b*) bituminous rock paving.

1st. Excavation.

All excavation for the pavement will be paid for by the cubic yard.

All material removed from between the two opposite curb lines shall be included in this class.

All material must be delivered at such place as shall be designated by the city engineer and the paving committee, and for all material hauled a distance exceeding 1,500 feet, an allowance of one per cent. per cubic yard for each one hundred feet in excess of 1,500 feet will be allowed.

Provided, that no extra allowance will be made for any material that shall be ordered delivered to any point included within the curb lines of Union square.

251 The price per cubic yard shall include all trimmings, tolling, tamping and leveling that in the opinion of the city engineer may be necessary to bring the streets to the proper subgrade as may be given by the city engineer.

The contractor without extra compensation shall remove all trees, old cross-walks, stumps and other obstructions that may be necessary for the proper execution of his work, but no street improvement or property owned by any party, parties or corporations and occupying street privileges under consent from Ogden city, shall be disturbed without written order from the engineer and the contractor shall be liable for any damage for violation of this rule.

In bringing the streets to the proper level the plow will not be

allowed to penetrate nearer than three inches of the finished subgrade, the remaining three inches being carefully dressed down with hand tools only.

The contractor shall excavate to such depths as the engineer may direct, and all work of excavation shall be paid for by the cubic yard of actual material excavated as measured in the ground before its removal, the earth classification only, will be allowed.

The contractor for excavation shall fill all places excavated below subgrade with material taken from other portions of the streets, and shall thoroughly tam- or roll as may be required, such filling, in layers not exceeding six inches in thickness, and shall bring the surface so made accurately to subgrade as given by the engineer.

252 The materials so taken from other portions of the street shall be such grade of earth or gravel as the engineer may designate and for such filling the contractor will be paid by the cubic yard of completed fill according to the bid for the same.

Curbing.

The curbing shall consist of good quality of hard sandstone or limestone, compact, homegen-ous throughout, free from cracks, pockets, seams or other defects.

The slabs shall be by least measure, five inches thick, twenty inches wide, and at least forty-eight inches long. The outer face for a depth of twelve inches, must be dressed to a smooth, hammered plane, except when the quarry face presents a smooth flat surface.

The rear face must also conform to the same conditions for a depth of at least six inches, and the two faces must be parallel and five inches apart.

The upper face must be neatly bush-hammered cressed to a uniform plane having a rising pitch of one-eighth inch in five inches to make it conform to the sidewalk surface.

The upper outer edge shall be rounded to a one-half-inch radius. The ends of the slabs must be square with the faces and dressed so as to give a uniform joint when laid the entire thickness of the curb, and of a depth of at least twelve inches from the top of the curb, said joint being in no case greater than one-fourth inch, nor averaging more than one-eighth inch in thickness.

The length of the curbstone as measured along its lower edge must be within one-twelfth of that of the upper curb.

253 The stones for curb corners shall be dressed with the outer edge circular with a two-foot radius, and four feet in length, the inner edge to be a right line joining the two inner edges, and the remaining requirements shall be the same as those for straight curbstones.

Excavations for curbings shall be made six inches below the lower edge of the curbstones, and the space so formed shall be filled with clean, coarse sand, wet and thoroughly tamped. On this sand bed finished stones will be carefully set to line and grade as given by the engineer with the faces vertical. All spaces at the

rear of the stones must be filled with clean sand and thoroughly tamped.

The price will be paid per lineal foot as measured upon the completed work along the outer edge of the curb. The said price shall include all excavating and back filling within the curb lines, and the removal of all the waste material from the streets, it shall also include all labor or other expense necessary to complete the work and maintain the same in perfect condition until accepted by Ogden city.

Stone paving.

The portion of the streets paved with rock, will be a strip ten feet wide along each curb, and along the center of the streets extending two feet each side of the street railway track.

The paving block shall be of Utah sandstone, free from all checks, pockets or other defects, of a quality equal to the sample furnished with the bid, and all to be subject to the inspection and approval of the city engineer and the paving committee.

All material rejected must be removed immediately from the work and not brought back again.

254 Approval of stone blocks in stock will not prevent rejection of any defective stone that may afterwards become discovered before the final acceptance of the work by Ogden city, and any such defective material or defective work, will upon the order of the engineer, be removed by the contractor and the pavement be made to conform to the intent of these specifications and the approval of the said engineer and paving committee.

The limiting dimensions of the stone pavings blocks shall be as follows:

Length, from 8 to 12 inches.

Thickness, from 3½ to 5 inches.

Depth, from 6 to 7 inches.

Each course of blocks transverse with the street shall be of the same thickness and depth, and the joints in the successive

255 courses shall break joints as nearly as possible along the middle points of the blocks.

The blocks are to be laid upon their edges with the stratification in a *verbal* position and the length of the block at right angles with the length of the street.

The blocks are to be laid face to face and end to end and the finished pavement no cracks between two adjacent stones less than one-fourth or more than one-half inch will be allowed except in joints at the ends of stones where three-fourth inches will be permitted.

After the blocks have been properly set they shall be tamped with a suitable tamper, or rolled, or both as the engineer may direct.

All spaces between the stone blocks will be filled with clean coarse sand into which will then be poured at not less than 250 degrees Fa-renheit such a mixture of asphaltum and crude petroleum oil as will make an impervious joint and one that will meet the approval of the engineer or paving committee. Over the pavement as thus

finished will be spread one-half inch of clean sand which will be allowed to remain.

The pavement thus finished must be true to grade and of even surface and subject in every particular to the approval of the paving committee and city engineer.

At all places where the stone pavement joins the asphaltum or bituminous rock pavement, the paving blocks will be laid so as to leave a toothed joint, the i-dentations of the same being about four inches in depth into which the asphaltum or bituminous rock pavement will key.

4th. Asphaltum or bituminous pavement concrete foundations.

All asphaltum or bituminous rock pavement will be upon a concrete base six inches thick.

256 The cement used will be *will be* English Portland cement, in quality equal to white cement, and shall be capable of the following tests.

When mixed with four parts sand and one part cement properly wetted and moulded, upon standing in air one day and in water six days, it shall withstand a tensile strain of fifty pounds per square inch.

Neat cement treated in a similar manner must give a tensil-strength of three hundred pounds per square inch.

The concrete will be made in the following manner:—Upon a tight floor will be thoroughly mixed, dry, one pint by the measure cement as above specified and four parts by measure, clean coarse quartz sand approved by the engineer and paving committees, after which it will be tempered with the least possible quantity of water. Into the morter thus made will be thoroughly incorporated six parts by measure or so much as will cause the morter upon tampering the concrete, to flash to the surface, of clean wet gravel of sizes that will pass through a two-inch ring. The concrete thus proportioned will be mixed until each stone will be thoroughly coated with the morter and until the gravel is uniformly distributed through the mass. Each batch thus prepared will immediately be spread and thoroughly rammed until the morter flashes to the surface in a smooth coating of mortar, the whole operation being done so quickly that none of the mortar, shall have begun to set.

In no event will concrete in which the mortar has begun to set be allowed.

The layer of concrete upon completion of the tampering must be uniformly six inches thick and of a smooth upper surface in exact conformity with upper crown of the street as given by the engineer.

257 The entire surface of the concrete will, immediately be covered with *a* even layer of sand one inch thick which will be kept wet for seven days after which the concrete will be carefully cleaned of all sand and allowed to thoroughly dry before any wearing surface is applied.

The contractor must barricade concrete until the pavement is completed and he will be held responsible for any damage that may occur to the same.

Wearing surface.

Upon the concrete base as specified will be laid a wearing surface of asphalt or bituminous rock, two and one-half inches thick which shall be according to the following specifications.

The asphaltum surface shall consist of

1st. Pure refined asphaltum of quality equal to the best, Trinidad Lake asphaltum.

2nd. Heavy petroleum residium oil.

3rd. Fine, clear and containing not more than 5% of clay or loam.

4th. Powdered carbonate of lime.

The petroleum oil must be free from all impurities and brought to a sp. gr. of from 18 to 32 degrees Beaume and to a fire test of 350 deg. Fa-renheit.

The powdered carbonate of lime must be of such fineness that at least 16 per cent. by weight will be an impalpable powder, and the whole of it will pass a No. 20 *seive*.

The sand will be of such size that none of it will pass a No. 80 *seive* and the whole of it will pass a No. 20 *seive*.

The refined asphaltum and the heavy petroleum *and the heavy petroleum* oil will be mixed in the following proportions by weight:

	Asphaltum...	100 parts.
258	Petroleum.....	17 to 80 parts.

The asphaltic cement thus made will be mixed with the other materials in the following proportions by weight:

Asphaltic cement.....	12 to	15 parts.
Sand.....	83 to	70 parts.
Carbonate of lime.....	5 to	15 parts.
	100	100

The sand and the asphaltic cement will be heated separately to 300 degrees Fa-renhi*et*. The carbonate of lime while cold will be mixed with the hot sand. After the sand and carbonate of lime have been thoroughly mixed the asphaltic cement will be thoroughly incorporated with the sand in a suitable app-ratus at 200 deg. Fa'-renheit.

The mixture thus prepared will be brought to the work in suitable carts which shall have heating apparatuses, if the weather requires it, and carefully spread at a temperature not less than 250 deg. F. The material will be first rolled with hot hand rollers, after which it will be sprinkled with neat cement and rolled with the steam roller continuously for not less than five hours for each 1,000 square yards.

The coating thus rolle l must have a uniform thickness of not less than two and one-half inches and must accurately conform to the crown and grade of the street as given by the engineer.

Extra care must be taken where the coating joins with that which

has previously been laid, that a firm bond and even smooth surface is obtained along the junction.

Where the pavement joins the stone pavement for the street railways the contractor for asphaltum paving will protect the same with a toothed edging of stone blocks similar to those specified for stone paving and laid in such a manner as to meet the
259 approval of the engineer or the paving committee, but if the pavement of the street railway should be laid contemporaneous with that of the balance of the streets, said stone contractor will furnish and lay the aforesaid stone edging instead of the contractor for asphaltum pavement.

Said stone edging will be included with the work of the contractor as above stated and shall be paid for by the square yard as such pavement; but should the same contractor lay both stone and asphaltum pavements said edging will be counted as stone pavement.

At such places as the asphalt pavement joins unpaved portions of the street, a plank edging shall be set by the contractor without extra charge.

Lumber so used must be the best of its kind and subject to the approval of the engineer or paving committee.

Bituminous rock pavement.

The foundation for bituminous rock pavement shall be the same as specified for asphalt pavement.

The bituminous rock for pavement, must be of uniform quality, must contain not less than 10% of asphaltum and must be free from any deleter-ous foreign matter.

The rock must be thoroughly disintegrated by heat at 300 deg. F. and must be ground, stirred or mixed in a suitable apparatus so as to obtain an homogeneous mass free from all lumps.

The treatment of the bitum-nous paving material and other conditions relating to the same are specified in paragraphs 41, 43, 49, 50, 51, 52, 53, 54, and 55 of asphalt paving specifications.

Cross-walks.

260 Cross-walks will be laid by the contractor for asphalt or bituminous rock pavement.

They shall be laid at such points as shall be directed by the city engineer or paving committee.

They shall be laid upon a concrete base as specified for asphalt pavement, six inches thick, and shall receive a coating of asphalt or bituminous rock pavement, two and one-half inches thick and shall consist of the same material as the remainder of the asphalt or bituminous rock pavement.

They shall be four feet wide and shall be laid to line, crown and grade as given by the city engineer.

The cross-walks shall be subject to the same specifications in every particular as those for the remainder of the asphalt or bituminous rock pavement.

The cross-walks shall terminate at the sides of the streets in a false curb of sandstone of quality and workmanship as specified for curbing, five inches thick, sixteen inches deep, four feet long, set paral-el*l* and level with the curb and fourteen inches out from same. The false curb will be set upon a foundation and in a manner specified for curbing, and will be furnished and set by the contractor for asphalt or bituminous rock pavement without extra charge.

Over the gutter thus formed between the false curb and the true curb will be set a plate of cast iron of form and pattern as shown by drawing of the same in city engineer's office. Said cast-iron plate to be furnished and set by the contractor at price per pound of cast iron as set in his bid for same.

At the ends of the cross-walks joining the stone pavements for the street railway a toothed-stone edging will be provided as for similar edging of asphalt or bituminous rock pavement and
261 under the same *and under the same* specifications.

Where cross-walks join unpaved portions of the street-plank edging as specified in asphalt pavement will be required without extra charge.

General Stipulations.

The city council reserves the right to reject any and all bids, or to award the work of the various classes to different contractors.

The amount of street torn up and obstructed and the order in which the work shall be performed shall be under the direction of the city engineer.

The several contractors shall as far as possible perform their respective portions of the work in such a manner as not to conflict with each other, and in case from any cause the paving committee and engineer shall consider that any contractor is careless or indisposed to proceed with the work or any part of the same as above stated, they shall have the power to employ labor and perform said work, deducting the cost of the same from the amounts that may become due said contractor.

No contractor shall be allowed to sublet any *p*rotion of his work without written consent of paving committee and engineer.

The work to be done under these specifications shall consist of all that portion of the street not required by territorial laws to be paved by street railways.

The contractor shall assume all risk of damage to life or property that may arise from the unsettled condition of the streets
262 and shall use all diligent means to prevent such accidents.

The contractor shall preserve the stakes set by the engineer and such as are destroyed will be reset at the contractor's expense.

The sewer manhole tops will be lowered to conform to the surface of the finished pavement by the contractor for asphaltum or bituminous rock pavement without extra charge.

A steam road roller and engineer will be furnished by the city

but the contractor using it will pay the wages of the engineer and cost of fuel and also $4.00 each day he shall use it.

The bids are to include the entire cost of the completed work in each class and no extra charge will be allowed except such as have been contracted for under the direction of the engineer.

In the interpretation of these specifications and any question arising under them between the contractors and the city, the decision of the engineer shall be final.

Contractors will be required to furnish all necessary assistance for the proper inspection of the material.

Payments.

Eighty per cent. of the contract price will be paid upon the monthly estimate of the engineer; and additional ten per cent. of the contract price upon the final estimate of the completed work, and the final ten per cent. six months after the completion of the work and upon the acceptance of the same by the city council. But it is understood that for work of the third and fourth classes
263 the bonds for the same shall remain in full force for five years in the case of the fourth class; three years for the third class as a guarantee that the respective contractors will make good any defects that may become apparent in that time and leave the pavement at the end of the period in a condition satisfactory to the city council and the city engineer.

Instructions to Bidders.

Each bidder is required to accompany his bid with a certified check for at least the amount shown as follows:

For excavation	$1,500
For curbing	500
Asphalt or bituminous rock pavement	1,500
Rock pavement	1,500

and the above checks will be required separately for the different classes of work as a guaranty of good faith that the bidder within ten days of the time an award is made will enter into contract with the city of Ogden and furnish bonds acceptable to the said city in the amounts of $20,000 for asphalt or bituminous rock pavement; $15,000 for rock pavement and $3,000 for each of curbing and excavation.

Each bid must be made upon the blanks furnished by the city and no alterations will be permitted except such as are made over the signature of the bidder and all blanks must be properly filled out as shown for each branch of the work upon which the proposal is designed to cover.

In bids made by a firm the individual signatures of all persons comprising the firm must be given with the place of residence of

same, but the signers may if they choose, describe themselves
264 as doing business under the name of the firm.

Any person signing the name of another must accompany such signature with written evidence of his authority to do so.

In the District Court of the Fourth Judicial District of the Territory of Utah, County of Weber.

J. C. ARMSTRONG, WILLIAM DRIVER, J. H. SPARGO, GEO. W. Murphy, John Broom, W. M. Chapman, and H. L. Griffin, Plaintiffs,

vs.

OGDEN CITY, WILLIAM H. TURNER, R. C. LUNDY, JOHN McManis, H. H. Spencer, W. N. Graves, Thomas D. Dee, H. W. Shurtliff, E. M. Allison, Jr., J. R. Elliott, F. J. Cannon, and James Calvert, Defendants.

Statement on Motion for New Trial.

This cause came on regularly for trial before the court on the 28th day of September, 1894, upon the complaint, supplemental complaint, and answers thereto, the said parties appearing by their respective counsel, Evans & Rogers and Zane & Zane appearing for the plaintiffs, and R. W. Whipple, Esq., appearing for the defendants; whereupon the following proceedings were had and done, to witness:

265 *Points Relied upon by Defendants on Motion for New Trial.*

The evidence introduced in said case did not and does not show:

1. That on March 29th, 1892, at 9.55 a. m., or at any other time or at all that D. H. Peery and sixty-eight others, including the plaintiffs in this action, or any persons whatsoever or who were then owners of real property in paving district No. 2 and with frontage on 25th street, within said paving district, and within the time fixed in the notice of intention, filed written objections to such improvements signed by the owners of one-half of the front feet abutting upon that portion of the street to be improved — ever filed such objection with the city recorder as provided by law.

2. That the evidence introduced in said cause did not and does not show that D. H. Peery and sixty-eight others, including the plaintiffs in this action in the supplemental complaint, or any persons or persons whomsoever who owned one-half of the whole frontage on 25th street and within said paving district ever filed any written objection to such improvements as required by law or at all.

3. The evidence introduced in said cause did not and does not show that after the hour of 10 o'clock a. m. on March 29th, 1892, certain persons who had signed written objections against the improvements or improvement complained of in the complaint withdrew their objections or protests, thus leaving at all times

2,111¾ feet frontage on 25th street still objecting or protesting against the improvement or local assessment or any improvement or assessment or at all; but, on the contrary, the evidence did and does show that the owners of 462½ feet within and abutting
266 on said paving district withdrew their protests before the hour of 10 a. m. of March 28th, 1892.

4. That the evidence introduced did not and does not show that any person or persons owning real estate in said district No. 2 and fronting on 25th street within said district ever filed any written objections or protests against the improvement or to such improvement or to any local assessment against or upon their property for the purpose of paying the cost of paving said district.

5. That the evidence did not and does not show that the notice of intention or otherwise that the total number of feet fronting on said 25th street in said paving district was 3,960 feet, nor did it nor does it show that 660 ft. belonging at the same time and still belonging to Ogden city was then and is now used for public purposes by said city, nor did it nor does it show that 125 feet was then and is now the property of Ogden city and was public-school property and used and owned for public schools.

6. That neither the evidence nor the record anywhere shows that the Ogden Union Depot and Railway Company, a corporation, was a plaintiff in this action either by the original complaint, the supplemental complaint, or any amendment thereto, — filed objections to said improvement as required by law or at all.

7. That the evidence introduced in this case did not and does not show that the number of feet frontage on said district was 3,300 feet, nor is the same so described in the ordinance marked "Ex. A," nor did it nor does it show that the difference between the district described in the ordinance and the district described in the notice of intention consisted or consists of 660 feet of the public property of Ogden city, nor did it nor does it show that the lots affected by said assessment complained of and in the ordi-
267 nance described varied in depth, some being seventy-five feet and others 150 feet, nor does it say that they vary in any manner whatsoever, nor did it nor does it show that the property owned by the various parties in this action varied greatly in depth, nor did not does the evidence show that no ascertainment of actual benefits to the property was ever made in order to determine the amount of assessment or to determine the amount the assessment exceeded the actual benefets to the property by reason of such improvements, nor did nor does the evidence show that the cost of the improvement was assessed upon the property abutting and fronting upon said 25th street and within said paving district at an arbitrary rate of $12 per front foot without any finding or attempt to find the amount of actual benefits to the property, nor did it nor does the evidence show that the said improvement was made without any general plan or form of public improvement having been adopted by said Ogden city, nor did nor does it show that the actual benefits to the property assessed are not equal nor uniform,

nor did nor does it show that said assessment was unequal and uniform.

8. That the evidence fails to show and fails to sustain the decision of the court in holding that "the assessment provided for in said ordinance passed March 29th, 1892, was and is invalid," but, on the contrary, the evidence did and does show that the said assessment was regularly and legally made, and that said ordinance was regularly and legally passed by the city council of said city on said date, and that the evidence did and does show that at the time of passing said ordinance the owners of one-half of the frontage in feet on 25th street and within said district had not objected to the improvement in writing or protested against the levying of any assessment against their property for the purpose of paying for said improvement.

268 9. That the evidence fails to show and fails to sustain the decision of the court that the said Ogden city or its council never obtained jurisdiction to make the said improvements upon said 25th street, but, on the contrary, the evidence did and does show that the city council had regularly and legally created said paving district, and had regularly and legally published a notice of intention to create said paving district and pave said street, and had jurisdiction to create said district, pave the same, and levy an assessment upon plaintiffs' property to pay the costs of making such improvement.

10. That the evidence fails to show and fails to sustain the decison of the court in this, "that no specifications for paving had been made by the city prior to the passing of the ordinance to pave said district, and the evidence wholly fails to show and wholly fails to sustain the decision of the court;" that afterwards new specifications were made, which provided, in addition to paving, for curbing said street within said paving district.

11. That the evidence fails to show and fails to sustain the decision of the court in this, "that the plaintiffs were at the time of filing the complai-t, to wit, May 21st, 1892, the owners of real estate mentioned in the complaint."

12. That neither the evidence nor the record in this case did n-r does show that Samuel Chapman, administrator of the estate of William Chapman, or Hester Broom, administrator of the estate of John Broom, deceased, were substituted as plaintiffs, but the evidence does show that both William Chapman and John Broom are and were deceased before the trial of this cause, and fails to show or sustain the decision of the court that anybody was substituted for them or either of them as parties plaintiff.

269 13. That the evidence introduced fails to show and fails to sustain the decision of the court that the said plaintif-s are entitled to recover from the city of Ogden the amount paid by them respectively to prevent the sale of their real estate, and that for the recovery of said amounts there is not plain, speedy, and adequate remedy at law for the reason:

(a.) That the evidence did and does show that the recovery of the amounts paid is barred by the provisions of sec. 1, chapter 41, Laws

of the 29th Session of the Legislative Assembly of the Territory of Utah, in this, that said amounts were paid under the so-called protest on Dec. 30th, 1893, and this suit was brought to recover the said amounts so paid by supplemental complaint filed on the 9th day of April, 1894, and more than sixty days after such payments were made.

(*b.*) That the evidence did not and does not show that such payments were made under protest, but, on the contrary, the evidence did and does show that the same were and are voluntary payments.

(*c.*) The evidence did not and does not show that the plaintiffs, Lamoni Grix, Ca*lr* Sorensonm, J. S. Lewis, Patrick Healey, Joseph Morely, Zilpha J. Stephens, Almira C. Baker, D. H. Stephens, D. M. Stephens, Mary A. Stephens, Elizabeth Stephens, J. O. Stephens, Ogden Union Depot and Railway Co., Geo. W. Murphy, Carrie Lewis, H. D. and J. S. Lewis, Patterson and He*laey*, ever made protest to such payments or to the payment of any tax so assessed or levied upon or against their property or so paid said amounts under protests, but, on the contrary, t does show that the said payment-, if any were made by them or either of them, were and are voluntary payments.

14. That that part of the fourth conclusion of law "that the plaintiffs have no plain, speedy, and adequate remedy at law for the recovery of the amounts paid by them under protest to pre-
270 vent the sale *the sale* of their property" is against law for the reason that sec. 1, chapeter 41, of the Laws of Utah Territory, approved March 13th, 1890, provides how and when such payments shall be made and how and when an action may be brought to recover such payments as may be illegal, inequitable, and unjust.

The following errors of law made by the court in the trial of said cause are relied upon by the defendants:

1. The court erred in rendering judgment in favor of the plaintiffs and against the defendants.

2. The court erred in rendering judgment in favor of *the* Samuel Chapman, administrator of the estate of William Chapman, deceased, for the reason that said Samuel Chapman as such administrator or otherwise had never been substituted as plaintiff or made plaintiff in this case by subsuitution or otherwise.

3. The court erred in rendering judg*emtu* aga-nst the defendant and in favor of the plaintiff Hester Broom, administrat*or* of the estate of John Broom, deceased, for the reason that the said Hester Broom as such administrat*or* was not a party to this action either by substitution or otherwise.

4. The court erred in holding that the owners of one-half of the frontage in feet on 25th street and within said *prai*ng district filed objections to making the improvements complained of, or in fact to any improvement or at all, for the reason that the evidence plainly shows that no objections to such improvements were ever filed with the recorder on or before 10 o'clock a. m. March 29th, 1892, as provided in the notice of intention to improve and pave said street and in accordance with law — at all.

271 5. The court erred in holding that the sale of the plaintiff's property in order to enforce the collection of the said assessment and tax would cast a cloud upon plaintiffs' title to the several tracts of land in the complaint described for the reason that if the said tax was void and invalid the sale of land to satisfy an illegal or invalid tax would not cast a cloud upon plaintiffs' title.

6. The court erred in holding that the plaintiffs had and have no plain, complete, and adequate remedy at law, because section 1, chapter 41, of the Laws of the 29th Legislative Assembly of Utah, approved March 13th, 1890, provides how and when such payment shall be made and how and when action may be brought to recover the same if found to be illegal, inequitable, and unjust.

7. The court erred in holding that Ann Horrocks, Joseph Morely, H. I. Griffin, or Geo. W. Kerr, guardian of the Nichols heirs, and William Driver had ever signed the so-called original protest, which, it is claimed by the plaintiffs, was filed with the city recorder, protesting against the levying of any local assessment upon the property in said district No. 2, on March 29th, 1892, at 9.55 o'clock a. m., or any protest filed at the said time or at all, or any protest at all, for the reason that the said names or either of them appear upon the said original protest introduced in evidence and marked "Def'ts' Ex. P."

8. The court erred in holding "that the defendants Ogden City, in pursuance of an ordinance passed March 22nd, 1893, *were* about to expose the real estate described in the supplemental complaint for sale to satisfy an illegal assessment imposed by the said ordinance, and that the parties plaintiffs in this action, after their said property had been advertised for sale and was about to be
272 sold to satisfy the said illegal assessment then due, paid under protest to said Ogden city the following amounts, to wit: J. C. Armstrong, $95.04; Mathias Biel, $63.00; Joseph Clark, $48.00; Samuel Chapman, for the William Chapman estate, $49.20; Joseph Clark, for Clark, Emmet and Thompson, $30.00; William Driver, $60.00; H. I. Groffin, $23.75; Lamoni Grix, $24.90; Ann Horrocks and James E. Horrocks, $124.80; Geo. W. Lashus, $60.00; H. D. and J. S. Lewis, $82.08; Carrie Lewis, $30.00; Joseph Morely, $36.00; Patrick Healey, for Patterson and Healey, $30.00; Joseph Clark, for Patterson and Clark, $60.00; L. R. Rogers, $74.04; J. H. Spargo, $48.00; D. N. Stephens, $14.70; Carl Sorenson, $20.40; W. C. Warren, $48.00; Geo. M. Kerr, guardian for Nicholas heirs, $160.08; D. H. Peery, Jr., $24.00; Realty Co. of Kittery, Ma., $748.80; Job Pingree, $35.40; Ogden Union Depot and Railway Co., a corporation, $118.80; Geo. W. Murphy, $154.20," for the reason that the evidence did not and does not show that said assessment was illegal, or, if illegal, the evidence did not and does not show that a sale of said property would cast a cloud upon the title.

9. The court erred in failing to find that plaintiffs' supplemental complaint is not a supplemental complaint for the reason that the said supplemental complaint does not state facts sufficient to constitute a supplemental complaint, and does not state anything additional or amendatory to the original complaint of J. C. Armstrong

et al. vs. Ogden C-ty *et al.*, filed herein May 22nd, 1892, and that the said pretended supplemental complaint does not state any matter consistent with or in aid of such original complaint, but states or attempts to state a new cause or causes of action, and asks other and different relief, and attempts to change the nature and object of the original action, and that the said supplemental complaint
273 brings in other and different parties plaintiffs, whose rights, if any they have, are other and different from those of the original plaintiffs at date of filing the original complaint or now, and who are and were not interested parties by the allegations in the original complaint.

10. The court erred in failing to find upon all the issues raised by the pleadings in this:

(*a.*) The court erred in failing to find upon the issues raised by defendants' answer that the cause of action of the plaintiffs and each and every cause of action of each and every one of said plaintiffs in the supplemental complaint for the recovery of taxes paid under the so-called protest is barred by the provisions of sec. 1, chapter 41, of the Laws Passed by the 29th Session of the Legislative Assembly of Utah, approved March 13th, 1890.

(*b.*) The court erred in failing to find upon the issue raised by the answer that there is a misjoinder of parties plaintiff in this, that in truth and in fact that each one of said plaintiffs is a seperate and independent person, and their action or causes of action, if any they have, is to each seperate and independent, requiring of this court the rendering of a seperate and independent judgement for the amount claimed by each and every one of said plaintiffs; that each of said plaintiffs is suing the defendants on a demand for money, the amount being specifically stated, and that each and every one of such claims and demands is for a different amount.

(*c.*) That the court erred in failing to find upon the issues raised by the answer that there is a misjoinder of causes of action in said supplemental complaint in this, that said supplemental complaint contains causes of action which are not separately stated and cannot properly be united, and that they are mingled and co-
274 mingled in the same allegation; in other words, said supplemental complaint sets forth but one cause of action, while in real-ty it embraces numerous causes of action, all for the different amounts and in favor of different persons, and that each of said causes of action is not seperately stated or seperately set out in a seperate cause or account in said complaint, and that said several causes of action as therein alleged do not effect all the plaintiffs therein alike, and that no one of said plaintiffs — in any way interested in the claim *said* upon by any one of the plaintiffs, but that the demand of each plaintiff, as well as the relief sought by him, is seperate and independent to himself, and that said several causes of action do not effect all the parties to the action and are not claims or demands or causes of action against all the defendants.

(*d*). The court erred in failing to find upon the question of estoppel raised by the defendants' amended answer to the supplemental complaint in this, that the plaintiffs named in the supplemental com-

plaint had full knowledge before and at the time that the said pavement was being constructed, and that the said assessment complained of was being and had been made, and that the contract complained of was being and had been let, and that the city, defendant herein, was about to and was expending large amounts of money in constructing said pavement in said district, and they, having such knowledge, took no legal steps to stop the said work or to question the proceedings of the city council until this supplemental complaint was filed in this court, several months after the work had been accepted by the city council as being complete and after the said city had fully paid for the said work; having
275 thus stood by and in silence of said assessment, the construction of said work, and the acceptance of the same, and the city having fully paid for it, the defendants were thus estopped to complain.

10. The court erred in allowing the witness Joseph Clark, over the objection of the defendant-, to testify that Geo. W. Murphy claimed to own property on 25th street, because that is not the proper way to prove title and ownership; that Scudder and Carlson occupied and were in possession of land on 25th St., because title and ownership cannot be proved that way, and because same was immaterial; that he was one of the owners named "Clark, Emmett and Thompson," because an objection signed "Clark, Emmet and Thompson" would not be evidence to the city council that the land was owned by Joseph Clark, R. W. Emmet, or James Thompson; that he knew about Job Pingree owning property, because he occupied a lot and claimed to own it, because it was immaterial; that Geo. W. Kerr, C. F. Taylor, W. V. Warren, Charles R. Krouch, Mary A. Stephens, D. M. Stephens, S. C. Stephens, H. D. and J. S. Lewis, John Maguire, D. H. Peery, Jr., Sarah E. Bunford, J. H. Watkins, E. J. Watkins, Fred. J. Kiesel, Carl Sorenson, Willard Kay, Lamoin Grix, Joseph Morely, John Broom held title to real estate on 25th street, because such evidence was wholly incompetent and immaterial.

11. The court erred in allowing James H. Spargo, a witness, to testify, over defendants' objection, that James H. Spargo, John Maguire, D. H. Peery, Sarah E. Bunford, Carl Sorenson, James E. Horrocks, Ann Horrocks, Reese Howell, J. H. Watkins, Rosa Kastom, Morris Livingston, Willard Kay, Lamoni Grix, Joseph Morely, and John Broom owned and held the title to lands abutting on district No. 2, on 25th street, because such evidence is incompetent and immaterial.

276 12. The court erred in allowing the witness J. C. Armstrong, over the defendant-' objection, to testify that Geo. W. Murphy, Scudder and Carleson, Job Pingree, Mathias Biehl, John Maguire, John M. Major, Adam Patterson, John A. Morrison, Rebecca McKee, William Driver, William Chapman, Charles Coonley, Geo. M. Kerr, were in possession of land abutting on 25th street and within paving district No. 2 on March 29th, 1892, because same was incompetent and immaterial.

13. The court erred in allowing the witness D. H. Peery, Jr., to

testify that he signed a protest for the Boston Realty Company without first producing legal authority so to do. The court erred in holding that said D. H. Peery, Jr., had authority to sign a protest for the Boston Realty Company, L. P. Birchfield, and the name of Evans, Rogers, and Peery, over the objection of the defendant made at the time. The court erred in holding that D. H. Peery, Jr., being joint tenant, could sign protest for the other joint tenants, David Evans and L. R. Rogers, and such signing would not be notice that David Evans and L. R. Rogers had protested.

14. The court erred in allowing the witness L. R. Rogers to testify, over defendants' objection, that H. Madden held a declaration of trust for his brother, Elwood Madden, to an undivided interest in a lot abutting on said paving district, and for the reason had authority to object to the improvement for said Ellwood Madden, for such testimony is immaterial and incompetent.

15. The court erred in allowing the witness L. R. Rogers, over defendants' objection, to testify that he signed the name of H. Madden and the name of E. Madden to the so-called protest or objection, and that after the city council had acted thereon said H.
277 Madden and E. Madden testified what the said witness had done in previously signing their said names without authority.

16. The court erred in allowing the witness L. R. Rogers to testify, over defendants' objection, that he signed the name of David Evans to the so-called protest without showing proper authority to do so; also in testifying that Mr. Evans ratified the act after the city council had acted upon the so-called protest so signed without authority.

17. The court erred in allowing the witness Geo. W. Kerr to testify, over the defendants' objection, that he signed the so-called protest by permission of the children, as the same was immaterial and incompetent.

18. The court erred in not striking out all the testimony of the witness D. H. Peery, Jr., L. R. Rogers, and Geo. W. Kerr, on motion of the defendants so to do, for the reason that it was not shown that they or either of them were the agents of the owners of the property which they represented by signing the so-called protest or had any legal authority to sign any protest.

19. The court erred in allowing the witness Charles R. Reid to testify, over the defendants' objection, that he signed the name of C. Fitzgereld to the so-called protest, because the evidence shows that he did not have authority so to do.

20. The court erred in allowing the plaintiffs, over defendants' objection, to amend the complaint by inserting the name of Ann Horrocks, and also in changing the name of "A. J. Morrison" to "J. A. Morrison;" also the name of "M. J. Warner" to that of "M. A. Warner," because the defendant- *was* thus taken by surprise and thus unable to successfully defend.

278 21. The court erred in refusing to strike out, on motion of the defendant- so to do, from the so-called protest the name

of C. Fitzgerald because it was shown that he never signed the name nor did any one sign it for him.

22. The court erred in allowing S. C. Stephens, over defendants' objection, to testify that he signed the names of D. M. Stephens, J. C. Stephens, D. H. Stephens, and John Pincock to the so-called protest, for the reason that the plaintiffs did not establish an agency in S. C. Stephens for the owners of the property or any authority in said witness to sign said persons' names to that or any protest or objection.

23. The court erred in allowing the witness B. H. Goddard to testify, over defendants' objection, that he signed the so-called protest for and in behalf of the quorum of seventies, the evidence showing that he had no legal authority so to do, and the court also erred in refusing to strike out the evidence of the said witness, on motion of the defendant- so to do, that the ratification, if any, came after the city council had acted on the protest, and for the further reason that the plaintiffs did not establish an agency in the witness Goddard for his principal.

24. The court erred in allowing the witness Geo. W. Murphy to testify, over defendants' objection, that he saw J. M. Major sign the so-called protest for himself and Mrs. Butterworth, for the reason that it was not shown that the said Major had any authority to sign for Mrs. Butterworth and because the same is immaterial and not the best evidence.

25. The court erred in allowing the witness Geo. W. Murphy, over defendants' objection, to testify that he saw other names than
279 his own upon the so-called protest, for the reason that simply seeing the name of a person signed to a protest is no evidence that the person signed the same or that the name was put there by another having authority, and is immaterial, and is not the best evidence.

26. The court erred in allowing the witness J. C. Armstrong to testify, over defendants' objection, that one O. E. Hill was the agent for C. F. Taylor, and in that way had the authority to sign the name of C. F. Taylor to the so called protest, and was an attempt to establish an agency by the declarations of the agent, and the court erred in refusing to strike out all the evidence of such witness on motion of defendant- for the reason that it did not tend to establish an agency in the said O. E. Hill to sign the said C. F. Taylor's name to the protest.

27. The court erred in refusing to strike out the testimony of the witness Joseph Clark, on defendants' motion so to do, to the effect that he signed the protest as "Clark and Patterson," when, in fact, the testimony shows that the land signed for was of record in the name- of Joseph Clark and Adam Patterson, for the reason that the signature to the paper, which purports to be a protest and signed "Clark and Patterson," would not be evidence of ownership to the city council unless the name of each owner was fully signed, and because it was immaterial and incompetent.

28. The court erred in refusing to strike out on defendants' motion that part of the testimony of the witness Joseph Clark in which

he testified that he signed the name of "Clark, Emmett and Thompson" to the paper which purports to be a protest, when, in fact, the land signed for was and is of record in the name- of Joseph Clark, W. R. Emmett, and James Thompson, for the reason that the so-called protest, signed "Clark, Emmett and Thompson," would
280 not be notice to the city council that Joseph Clark, W. R. Emmett, and James Thompson had protested for the frontage owned by them.

29. The court erred in allo*n*ing the witness John A. Boyle to testify, over defendants' objection, that one Healey told him to sign for Patterson, and that because of that he signed the name- "Boyle and Patterson" to the so-called protest, purporting to represent land fronting on 25th street, which was of record in the name- of Geo. W. Driver, Adam Patterson, Patrick Healey, and John A. Boyle, and the court erred in refusing to strike out such evidence on motion of the defendant- on the ground that an agent cannot delegate his authority, the evidence being incompetent and immaterial, and for the further reason that the protest being signed "Boyle and Patterson" would not be notice to the city council that Geo. Driver, Adam Patterson, Patrick Healey, and J. A. Boyle had protested for lands owned by them.

30. The court erred in allowing the witness Lindsey to testify on part of the plaintiff-, over the objection of the defendant-, to contradict and impeach the testimony of Mr. Krouch, the plaintiffs' own witness. The court erred in allowing the plaintiff- to impeach his own witness by introducing other witnesses to contradict him over the objection of the defendant-.

31. The court erred in allowing the protest under which certain of the plaintiffs paid the first installment of the tax, and which was directed to C. M. Brough, treasurer of Ogden city, to be introduced in evidence over defendants' objection, so far as it related to the letting or limiting the bidders to *boni fied* residents of Ogden city; second, so far as it relates to the notice of intention to
281 create the paving district, for the reason *the paving district for the reason* that the supreme court of this Territory- as passed upon this notice and held it good; also so far as it relates to the fact that no special fund out of which the pavement should be paid for was provided for, and so far as the names appearing upon the said protest are represented by attorneys, agents, and administrators, without first showing their authority to so represent them, because it was in that respect immaterial and incompetent.

32. The court erred in allowing the plaintiff- to introduce, over defendants' objection, the protest signed "Realty Company of Kittery, Ma., by D. H. Peery, Jr., agent," and addressed to Willis T. Beardsley, Esq., city auditor, Ogden city, Utah: First, because said protest was directed to the city auditor, and it should have been directed to the city collector; second, because said protest nowhere states that suit will be brought to recover the taxes thus paid, as provided by law.

33. The court erred in allowing the plaintiff- to introduce, over the

objection of the defendant-, the protest signed "D. H. Peery, Jr.," and addressed to Willis T. Beardsley, Esq., city auditor, Ogden city, Utah: First, because the same was directed to the city auditor, and it should have been directed to the city collector; second, that said protest nowhere states that suit will be brought to recover the taxes so paid, as provided by law.

34. The court erred in striking out over defendants' objection and not considering withdrawals introduced in evidence by the defendant- and which had been filed with the city recorder of Ogden city prior and up to 10 a. m., March 29th, 1892.

35. The court erred in striking out and not considering withdrawals introduced in evidence by the defendants and filed with the city recorder after 10 a. m., March 29, 1892, and before
282 the city council had acted upon the protest or objection to the improvement or assessment.

36. The court erred in ordering, upon its own motion and over defendants' objection, that all secondary evidence with respect to withdrawals heretofore adduced be stricken out.

37. The court erred in holding that the signatures "Clark and Patterson" on the original protest against levying any local assessment upon property belonging to Joseph Clark and Adam Patterson, and which purports to have been filed with the city recorder at 9.55 a. m., March 29th, 1892, was sufficient notice to the city council that Joseph Clark and Adam Patterson had protested or objected to the improvement which affected land abutting upon said street and district, the title of which was at the time and still is of record in the name- of Joseph Clark and Adam Patterson, and was and still is owned by them.

38. The court erred in holding that the signatures "Clark, Emmet and Thompson" on the original protest against levying any local assessment, and which purports to have been filed with the city recorder at 9.55 a. m., March 29th, 1892, was sufficient notice to the city council that Joseph Clark, R. W. Emmet, and James Thompson had protested or objected to the improvement which effected lands abutting upon said street and district, which was at that time of record in the name- of Joseph Clark, R. W. Emmet, and James Thompson, and was at that time owned by them.

39. The court erred in holding that the signatures "Scudder and Carlson" on the original protest against levying of any local assessment, and which purports to have been filed with the city recorder at 9.55 a. m., March 29th, 1892, was sufficient notice to the city council that William Scudder and Joseph Carlson had pro-
283 tested or objected to the improvement which effected land abutting upon said street and district, the title of which was at the time of record in the name- of William Scudder and Joseph Carlson, and was at that time owned by them.

40. The court erred in holding that the signature "Geo. M. Kerr" or "Cur, administrator," on the original protests against levying any local assessment, and which purports to have been filed with the city recorder at 9.55 a. m., March 29th, 1892, was sufficient no-

tice to the city council that Geo. M. Kerr, guardian, had protested or objected to the improvement which effected land abutting upon said street and within said district, the title of which was at that time *was* of record in the name- of John Nichols, Garner Nichols, Jane A. Nichols, Rose Nichols, and Leslie Nichols, and was at that time owned by them.

41. The court erred in holding that the signature- "Boyle and Patterson" on the original protest against levying any local assessment, and which purports to have been filed with the city recorder at 9.55 a. m., March 29th, 1892, was sufficient notice to the city council that John A. Boyle and Adam Patterson had protested or objected to the improvement which effected lands abutting upon said street and within said district, the title of which was at the time in the name- of John A. Boyle and Adam Patterson and still owned by them.

JAMES N. KIMBALL,
R. H. WHIPPLE,
Attorney- for Defendants.

O K.
J. N. KIMBALL.

284 To the said plaintiffs and Messrs. Zane and Zane and Evans & Rogers, attorneys for plaintiffs:

You will please take notice that the defendants in the above-entitled action have prepared and do hereby serve on you the foregoing as their statement on the case in said action, to be used on their motion for a new trial and on appeal in the event an appeal is taken by either party in said action.

Dated December 11th, 1894.

JAMES N. KIMBALL,
R. H. WHIPPLE,
Attorneys for Defendants.

Served on us this 11th day of December, 1894.

EVANS AND ROGERS,
ZANE AND ZANE,
Attorneys for Plaintiffs.

We, the attorneys in the above-entitled cause, hereby certify that the foregoing statement is correct.

Ogden, Utah, January 11th, 189–.

EVANS & ROGERS,
ZANE & ZANE.
R. H. WHIPPLE,
Att. for Defendant-.

Settled as correct this 11th day of January, 1895.

WILLIAM H. KING, *Judge.*

With proposed amendments delivered to clerk for trial judge this 24th day of Dec., 1894.

D. H. PEERY, JR., *Clerk,*
By SAM. J. MYERS, *Deputy.*

285 In the Fourth Judicial District Court of the Territory of Utah, County of Weber.

J. C. ARMSTRONG, WM. DRIVER, J. H. SPARGO, GEO. W. MURPHY, John Broom, W. M. Chapman, and H. I. Griffin, Plaintiffs,

vs.

OGDEN CITY, WM. H. TURNER, R. C. LUNDY, JOHN MCMANIS, H. H. Spencer, M. N. Graves, Thos. D. Dee, H. W. Shurtliff, E. M. Allison, Jr., J. R. Elliott, F. J. Cannon, Jas. Calvert, Defendants.

Findings, Conclusions, and Decree.

This cause having come on to be heard before the court, on the 28th day of September, 1894, upon the complaint, supplemental complaint, and the answers thereto, and the court having heard the evidence and the proofs and the arguments of counsel, Evans and Rogers and Zane & Zane appearing for plaintiffs and R. H. Whipple & J. N. Kimball appearing for defendants, and the court, being fully advised, makes its findings of facts and conclusions of law as follows:

Findings of Fact.

1. That the plaintiffs above named were at the date of the filing of the complaint in this action residents and tax-payers in Ogden city, Weber county, Utah Territory, and brought this action
286 concerning a matter of general interest to all tax-payers in said Ogden city on their own behalf and on the behalf of all others similarly situated.

2. That the defendants above named, except Ogden City, at the time of the bringing of this action were the mayor and members of the common council of said Ogden City, defendant.

3. That on the 7th day of March, 1892, proceedings were had by the common council of said Ogden city as follows:

"Finance committee recommending immediate creation of three paving districts as follows: District No. 2, Twenty-fifth street from the west line of Washington avenue to the west line of Wall avenue.

Councillor Dee moved to lay on the table for one week. Motion lost.

Councillor McManis moved to adopt the motion. Carried."

4. That the above *was* the only proceedings had by said council of Ogden city in regard to the creation of said paving district prior to the publication of the notice hereinbelow mentioned; and upon the same day the following proceedings were had:

"Councillor Spencer moved the following motion, in pursuance of the proceedings already taken in ordering the creation of three paving districts:" I move that the council adopt the accompanying notice of intention, and that the same be published for twenty days, beginning with tomorrow morning, Tuesday, March 8th. Said notice was read and Councillor Dee moved to lay on the table for one week. Motion lost, Dee and Elliott voting "aye;" Calvert, Cannon, Graves, McManus, Shurtliff, and Spencer voting "nay." The original motion was then put and carried, Calvert, Cannon, Graves,

McManus, Shurtliff, and Spencer voting "aye" and Dee and Elliott voting "nay."

287 5. That thereupon, on March 9th, 1892, in the Ogden Daily Standard the following notice *on* intention mentioned above was published, to wit:

"Notice of intention of the city council of Ogden city of creating a district for paving and of paving and macadamizing the streets therein and to defray the expenses of such improvement by local assessment.

The city council of Ogden city, situate in the county of Weber, Territory of Utah, gives notice that it intends to make the following improvements, to wit, pave and macadamize the following streets: Twenty-fifth street from the west line of Washington avenue to the west line of Wall avenue. This district shall be known as paving district No. 2. The boundaries of the district to be effected and benefitted are the lines running one hundred and fifty *frt abck* and parallel with the outer lines of each side of the streets on each and every bloak and for the full length thereof therein. The estimated cost of such improvement is $40,000. For the payment of the costs and expenses thereof the city council intends to levy local taxes upon the real estate lying and being within said paving district and to the extent of the benefits to such property by reason of such imptovement. The city council will, on March 26th, 1892, at 10 a. m., hear objections in writing and from any and all persons interested in said local assessment.

By order of the city council:

T. P. BRYAN,
City Recorder."

6. That on March 29th, 1892, at 9.55 o'clock, D. H. Peery and sixty-eight others, including all the plaintiffs in this action
288 and in the supplemental compalint, who were then the owners of real property within the said paving district No. 2 and with frontage on 25th street within the said paving district, filed a protest with the said recorder of said Ogden city, protesting against the levying of any local assessment against or upon their property for the purpose of paving said street within said district; that said persons so protesting owned and protested for more than one-half of the whole frontage on said Twenty-fifth street within said district, to wit, 2,414 feet; that after said hour of 10 a. m. of said day certain persons who had protested to the amount of 302½ feet withdrew their protests, leaving at all times 2,111½ feet frontage on said Twenty-fifth street in said district still protesting against the said local assessment; that the total number of feet fronting on said Twenty-fifth street in said paving district, as mentioned in said notice of intention above set forth, was 3,960, of which 660 feet belonged at said time and still belongs to said Ogden city and *was* then and *is* now used for public purposes by the said city, and 125 feet of said frontage *was* then and *is* now the property of the said

Ogden city and *was* public-school property, used and own*de* for public schools.

7. That notwithstanding said protest of said abutting property owned on said Twenty-fifth street in said paving district number 2, and without giving any other or further notice except as herein-before stated, the said city council, on the 4th day of April, 1892, passed the following resolution, to wit:

289 "Resolved, That the city proceed as speedily as possible to the paving of Twenty-fifth Street district with Utah sandstone blocks; that the city engineer be instructed to prepare the necessary specifi-ations as once and submit the same at the next meeting of the council; that the competition of said work be restricted to *bona fide* residents of Ogden, and that so far as it is possible only Ogden labor be employed in the performance of the work."

8. That on May 2nd, 1893, said city council of Ogden city passed a resolution instructing the city recorder to advertise for bids for the praing of 25th street in said district; which notice was as follows:

"To paving contractors: Bids will be received by the city recorder of Ogden city until 12 o'clock m. May 23rd, 1892, for the paving of 25th street, in Ogden city, from Washington to Wall avenue, according to the specifications of the city engineer of Ogden city, on file in the city recorder's office. Competition is restricted to *bona fide* residents of Ogden city. The city reserves the right to *ad*ject any and all bids. Specifications will be furnished on application to the city recorder."

9. That no specifications had been made by the city prior to this time, but afterwards new specifications were made and filed providing for the paving, grading, and curbing of said 25th street and were adopted by the city council; which specifications provided for the paving of said street with asphaltum and the sides of the street with sandstone blocks and curbing the street, and the contract which was awarded for the doing of said work provided that the contractor should keep the said street in repair for two years after the work upon the same was finished.

290 10. That the plaintiffs in this action were at the date of the filing of the complaint herein, to wit, May 21st, 1892, the owners of the real property mentioned in the complaint, but upon the trial of this action it appeared that John Broom and William Chapman were deceased; Samuel Chapman, administrator of the estate of William Chapman, and Hester Broom, administrat*or* of the estate of John Broom, were substituted as plaintiffs, and said other parties were still the owners of the property mentioned as belonging to them in the complaint in this action.

11. That said plaintiffs had upon filing their complaint obtained a temporary injunction against the said defendants, but afterwards a demur-er to said complaint was sustained by the said court and said complaint ordered dismissed; which ruling was afterwards by the supreme court of the Territory of Utah reversed, and the said cause was ordered remanded, with directions to the defendant to answer said complaint.

12. That the said council, in spite of the protest hereinbefore mentioned, proceeded and at the time of the filing of the complaint in this action had upon its passage the ordinance attached as Exhibit B to the complaint in this action, and afterwards, on the 22nd day of March, 1893, passed the ordinance which is hereto attached and marked Exhibit A and made a part of these findings.

13. That on the 9th day of April, 1894, the plaintiffs filed a supplemental complaint in this action and asked that Mathis Biel, Joseph Clark, Geo. W. Lashus, Lamoni Grix, Carl Sorenson, J. E. Horrocks and Ann Horrocks, J. S. Lewis, Lindsey R. Rogers, Patrick Healey, Joseph Morely, Zilpha J. Stephens, W. C. Warren, Almira C. Baker, D. H. Stephens, Mary A. Stephens, Elizabeth Stephens, and The Ogden Union Depot and Railway Company, a corporation, be made parties to this action; which supple-
291 mental complaint was ordered by the court to be filed; that at the time of the filing of the supplemental complaint the said parties (except The Ogden Depot and Railway Company, a corporation) were and still are the owners of real estate fronting on said Twenty-fifth street (and said plaintiff last named was the owner of real estate assessed with said special tax, but not included in said paving district) included in said paving district, and upon the trial of this action D. H. Peery, Jr., and The Realty Company of Kittery, Maine, a corporation, and J. Pingree and Zilpha J. Stephens, Carrie Lewis, and George W. Murphy were added as parties plaintiff and were at the date and still are the owners of real estate in said district fronting on said Twenty-fifth street, the pleadings having been allowed to be amended by the court in accordance with such facts.

14. That said Ogden city, in pursuance of said ordinance of March 22nd, 1893, *were* about to expose the real estate described in the original and supplemental complaint to sale to satisfy the illegal assessment imposed by said ordinance, and that the parties plaintiff in this action, after their said property had been advertised for sale and was about to be sold to satisfy the said illegal assessment then due, paid under protest to said Ogden city, in order to prevent the sale of their property, the following amounts, to wit: J. C. Armstrong, $95.04; Mathias Biel, $63; Joseph Clark, $18; Samuel Chapman, for the William Chapman estate, $19.20; Joseph Clark, for Clark, Emmet and Thompson, $30; William Driver, $60; H. I. Griffin, $23.76; Lamoni Grix, $24.90; Ann Horrocks and James E. Horrocks, $124.80; Geo. W. Lashus, $60; H. D. and J. S. Lewis, $82.09; Carrie Lewis, $30; Joseph Morely, $36; Patrick Healey, for P-tterson and Healey, $30; Joseph Clark, for Patterson and
292 Clark, $60; L. R. Rogers, $74.04; J. H. Spargo, $48; D. M. Stephens, $14.70; Carl S. Sorenson, $20.40; W. C. Warren, $48; Geo. M. Kerr, guardian of the Nichols heirs, $160.08; D. H. Peery, Jr., $24; Realty Company of Kittery, Maine, $748.80; Job Pingree, $35.40; Ogden Union Depot and Railway Company, a corporation, $118.80; Geo. W. Murphey, $154.20.

15. That said plaintiffs are without any speedy and adequate remedy at law for the recovery of said amounts without a great multiplicity of the suits, and said assessment constitutes a cloud

upon the title of the various plaintiffs to their several parcels of realty, and that said city asserts that it will annually for nine years hereafter levy assessments upon said real estate for the payment of said paving and collect the same from the said parties plaintiff, and has already caused to be sold the property of certain of the plaintiffs under and by virtue of said assessment.

16. That the number of feet frontage in said paving district was 3,300, as the same is described in the ordinance, Ex. A; that the difference between the district described in the ordinance and the district described in the notice of intention consisted of 660 feet of the public property of the said Ogden city, and the lots affected by the said assessment and described in said ordinance varied in depth, some being 75 feet deep and others 150 feet deep, and that the property owned by the various parties plaintiff in this action varied greatly in depth; that no ascertainment of actual benefits to the property assessed was ever made in order to determine the amount of assessment or to determine whether the amount assessed exceeded the actual benefits to the property by reason of the improve-
293 ment, but the cost of the improvement was assessed upon the property abutting and fronting upon Twenty-fifth street within the said paving district at an arbitrary rate of $12 per front foot without any finding or attempt to find the amount of actual benefits to the property; that the said improvement was made without any general plan and form of public improvement having been adopted by the said Ogden city, and the actual benefits to the property assessed for said improvement were not equal and uniform, nor was said assessment equal and uniform.

Wherefore the court finds as conclusions of law—

1. That the said assessment provided for in said ordinance passed March 22nd, 1893, was and is invalid.

2. That the said Ogden city or its council never obtained jurisdiction to make the said improvements upon said Twenty-fifth street.

3. That the said assessment constitutes and is a cloud upon the title of the plaintiffs to the real property which they own within said paving district, and all sales made by said city of any of plaintiffs' said real estate are void and of no effect whatever.

4. That the said plaintiffs are entitled to recover from the said city of Ogden the amounts paid by them respectively under protest to prevent the sale of their real property, and that for the recovery of the said amounts there is no plain, speedy, and adequate remedy at law.

5. That the said plaintiffs are entitled to a perpetual injunction restraining the said city of Ogden, its officers, agents, employés, and attorneys, from taking any further action in regard to levying the said assessment upon the property of the plaintiffs in the complaint and supplemental complaint.

294 *Decree.*

Wherefore, in accordance with the proceedings, findings of fact, and conclusions of law, it is by the court, upon motion of Evans &

Rogers and Zane & Zane, attorneys for plaintiff-, ordered, decreed, and adjudged that the said Ogden city, its officers, agents, attorneys, servants, and employés, be, and they are hereby, forever enjoined and restrained from taking any steps for the further collection of the assessment provided for in the ordinance of the said city passed March 22nd, 1893, so far as the same concerns the property of the plaintiffs in this action hereinbefore mentioned; that the cloud upon the real estate of the said plaintiffs created by the said invalid assessment and any sales made by said city of either of plaintiff's said real estate be, and the same is hereby, removed and declared to be of no force or effect, and said sales are adjudeg- to be void.

That each and every of said plaintiffs above named do have and recover from the said Ogden City, defendant, the amounts hereinbefore stated as having been paid by them respectively under protest, as aforesaid, to wit:

J. C. Armstrong, $95.04; Mathian Biel, $63; Joseph Clark, $48; Samuel Chapman, for the William Chapman estate, $49.20; Joseph Clark, for Clark, Emmet and Thompson, $30; William Driver, $60; H. I. Griffin, $23.76; Lamoni Grix, $24.80; Ann Horrocks and James E. Horrocks, $124.80; Geo. W. Lashus, $60; D. H. and J. S. Lewis, $82.08; Carrie Lewis, $30; Joseph Morely, $30; Patrick Healey, for Patterson and Healey, $36; Joseph Clark, for Patterson and Clark, $60; L. R. Rogers, $74.04; J. H. Spargo, $48; W. M. Stephens, $14.70; Carl Sorenson, $20.40; W. C. Warren, $48; Geo. M. Kerr, guardian of the Nichols heirs, $160.08; D. H. Peery, Jr., $24; Realty Company of Kittery, Maine. $748.80; Job Pingree, $35.40;
Ogden Union Depot and Railway Company, a corporation,
295 $118.80; Geo. W. Murphey, $54.20.

And that the said plaintiffs do have and recover from said Ogden City, defendant, their costs herein, taxed at the sum of $228.10.

Done in open court this 27th day of October, 1894.

WILLIAM H. KING, *Judge.*

Filed Oct. 27th, 1895.

Ex. "A."

An ordinance creating paving district No. 2 and levying and assessing a special tax upon the abutting property in said district to pay the cost of paving therein.

Whereas, the city council has heretofore ordered to be published in the Standard, a daily newspaper printed and published in Ogden city, for the full period of twenty days, the following notice of intention:

Notice of intention of the city council of Ogden city of creating a district for paving and of paving and macadamizing the streets therein and to defray the expenses of such improvement by local assessment.

The city council of Ogden city, situate in the county of Weber, Territory of Utah gives notice that it intends to make the following

improvements, to witness: Pave and macadamize the following streets; Twenty-fifth street *for* the west line of Washington avenue to the west line of Wall avenue. This shall be known as paving district No. 2.

The boundaries of the district to be effected and benefitted
296 are lines running one hundred and fifty feet (150 feet) back and paral-el*l* with the outer lines of each side of the street on each and every block and for the full length thereof therein. The estimated cost of such improvement *of* fort*h* thousand dollars (40,00-) for the payment of the cost and expenses thereof the city council intends to levy taxes upon the real estate lying and being within said paving district to the extent of the benefits to such property by reason of such improvement.

The city council will on March 29th, 1892, at 10 a. m. hear objections in writing from any and all persons interested in said local assessment.

By order of city council:

T. P. BRYAN,
City Recorder.

And whereas, the said notice of intention was published daily, continuously in said newspaper from March 29th, 1892, until March 31st, 1892, and whereas, in said paving district No. 2 there has not been filed, writ-en or any objections to the improvements mentioned signed by the owner of one-half of the front feet on said 25th street from the west line of Washington avenue to the west line of Wall avenue.

Now, therefore be it ordained by the mayor and city council of Ogden city, as follows:

SECTION 1. That for the purpose of paving 25th street from the west line of Washington avenue to the west line of Wall avenue be, and the same *in* here constituted a paving district, and shall be known as paving district No. 2, of Ogden city.

SECTION 2. That said 25th street be paved from the west line of Washington avenue to the west line of Wall avenue, as follows:
297 With Utah sandstone blocks for ten feet out from the curb on each side of the said street, and the balance of said street with asphaltum. That said pavement shall be laid and constructed under the supervision of the city engineer, and shall be done under contract to be, let by the city to the lowest bidder for such work.

SECTION 3. That the cost of making such improvement of laying said pave ment (except intersections of streets and spaces opposite alleys within said district) shall be assessed upon the lots and lands abutting upon 25th street in proportion to the front feet so abutting upon 25th street.

SECTION 4. A special tax of twelve dollars ($12) per front foot upon the property abutting upon 25th street from the west line of Washington avenue to the west line of Wall avenue, is hereby levied for the purpose of laying and making said improvement as hereinbefore provided for, and said tax shall become *come* delinquent as follows; one-tenth shall become delinquent fifty days after the pas-

sage of this ordinance: one-tenth in one year: one-tenth in two years; one-tenth in three years: one-tenth in four years; one-tenth in five years; one-tenth in six years; one-tenth in seven years; one-tenth in eight years and one-tenth in nine years after the passage of this ordinance, and each installment except the first shall bear interest at the rate of seven per cent. per annum from and after the passage of this ordinance until the same shall become delinquent, and after the same shall become delinquent interest at the rate of ten per cent. shall be paid thereon, and such tax shall be collected and enforced as in any other case of special tax.

The property to be effected by and upon which said tax is levied is as follows: Lots six (6) and seven (7) block 19. Lots six (6) seven (7) eight (8) nine (9) and ten 10 block 20; lots one (1) and two (2) block 23; lots one (1) two (2) and three (3) four (4) and five (5) block 24; and lots one (1) and two (2) block twenty-five (25) in
298 plat "A" Ogden City survey.

SECTION 5. That the Ogden City Street Railway Company, a corporation heretofore created and now operating an electric street railway in said paving district on said Twenty-fifth street from the west line of Washington avenue to the west line of Wall avenue, be and it is required and directed to pave all the space between its different rails and tracks of said Twenty-fifth street and a space of two feet wide outside of the rails each side of said track and also all the space between the rails of all side tracks and two feet on the outer side of the rails on each side of the said side tracks at the same time the paving is done on the other parts of the said street and the pavement to be laid and made by the said railway company shall be of Utah sandstone of the same kind and quality as that used by the city.

SECTION 6. That the Ogden Electric Railway Company, known as the Brinker-Henderson Company, a corporation heretofore created and now having a street railway track inside paving district on said Twenty-fifth street from the west line of Washington avenue to the west line of Wall avenue, be and it is required and directed to pave all the space between its different rails and tracks on Twenty-fifth street and a space of two feet wide outside of the rails on each side of said track, and also the space between the rails on all side tracks and two feet on the outer side of the rails on each side of the said side track, of Utah sandstone of the same kind and quality as that used by the city, at the same time the paving is done on the other parts of the street; and the pavement to be made and laid by said street railway company shall be of the same material as the other paving upon the street. That after said pavement is
299 laid said railway company is required and directed to keep that portion of the street which it is herein required to pave, in good and proper repair, using for said purpose the same material that the said street is or shall be paved with, and shall keep the said pavement level with the top rails of the track of its railway.

SECTION 7. That G. W. Jones, A. J. Warner, A. I. Stone, John Maguire and John H. Restall, members of the city council, be and they are hereby appointed a board of equalization and review of the

taxes levied under this ordinance and upon the completion of the list or lists of the property in said paving district No. 2 to be taxed the said list or lists shall be placed in the hands of the said board and the said board shall give public notice of the completion of said list or lists and appoint not less than five consecutive days upon which they will meet during the usual business hours, and during the time specified shall keep the said list or lists open to public inspection and any pærson or persons feeling themselves ag-rieved shall have a hearing before the said board, and the said board are hereby granted power and authority to make correction of any tax deemed by them unequal and unjust.

Passed March 22, 1893.

Filed Oct. 27, 1894.

300 OGDEN, UTAH, *Nov.* 2, 1894.

J. C. ARMSTRONG *et al.*, Plaintiffs,
vs.
OGDEN CITY *et al.*, Defendants.

It is hereby stipulated and agreed that the defendants shall have until Dec. 1, 1894, to prepare and serve statement on motion for new trial.

EVANS & ROGERS,
ZANE & ZANE,
Attorneys for Plaintiffs.

Dated Nov. 2, 1894.

Filed Nov. 2, 1894.

301 In the District Court of the Fourt- Judicial District of the Territory of Utah and County of Weber.

J. C. ARMSTRONG *et al.*, Plaintiffs,
vs.
OGDEN CITY *et al.*, Defendants.
Notice of Intention to Move for New Trial.

To Evans & Rogers and Zane & Zane, attorneys for plaintiffs:

Take notice that the defendants in the above-entitled action intend to move the court to vacate and set aside the decision of the court rendered in the above-entitled action and to grant a new trial of said cause and upon the following grounds:

1. Insufficien[illegible] of the evidence to justify the decision, and that said decision is against law.

2. Errors of law occur-ing at the trial and excepted to at the time by the defendants.

3. Said notice will be made upon a statement of the case hereafter to be prepared and served upon you.

R. H. WHIPPLE,
Attorney for Defendants.

Filed Nov. 3, 1894.

D. H. PEREY, JR., *Clerk*,
By SAM. J. MYERS, *Deputy.*

Copy received this 3rd day of November, 1894.

EVANS & ROGERS,
ZANE & ZANE,
Attorneys for Defendants.

302 In the District Court of the Fourth Judicial District, Utah Territory, Weber County.

J. C. ARMSTRONG *et al.*, Plaintiff-,
vs.
OGDEN CITY *et al.*, Defendant-.

On motion of R. H. Whipple, attorney for defendant-, it is ordered that said defendant- be granted 30 days' further time in which to prepare and serve statement on motion for new trial.

WILLIAM H. KING, *Judge.*

Dated Nov. 12, 1894.
Entrance of record, Nov. 12, 1894.

303 In the District Court of the Fourth Judicial District, Territory of Utah, Weber County.

J. C. ARMSTRONG *et al.*, Plaintiffs,
vs.
OGDEN CITY *et al.*, Defendants.

On motion of R. H. Whipple, attorney for defendant-, it is hereby ordered that said defendant- be granted until January 1, 1895, in which to prepare and serve statement on motion for new trial herein.

WILLIAM H. KING, *Judge.*

Dated Dec. 10, 1894.
Entrance of record, Dec. 10, 1894.

304 In the District Court of the Fourth Judicial District, Territory of Utah, County of Weber.

J. C. ARMSTRONG *et al.*, Plaintiffs,
vs.
OGDEN CITY *et al.*, Defendants.
Notice of Presenting Defendants' Statement on Motion for Trial to the Judge or Clerk.

To the above-named plaintiffs and to Zane & Zane and Evans & Rogers, their attorneys:

You and each of you are hereby notified that your proposed amendments to statement on motion for new trial, heretofore served on you, are not adopted, and that this defendant- will, on Monday, December 24, 1894, present said statement on motion for new trial, with your proposed amendments thereto, to the judge who tried the cause or deliver same to the clerk of the fourth judicial court in and

for said Territory for said judge, and ask said judge to settle such statement.

Take notice and govern yourselves accordingly.

R. H. WHIPPLE,
Attorney for Defendants.

Filed Dec. 17, 1894.

D. H. PEERY, JR., *Clerk*,
By SAM. J. MYERS, *Deputy.*

305 In the District Court of the Fourth Judicial District, Territory of Utah, Weber County.

J. C. ARMSTRONG *et al.*, Plaintiffs,
vs.
OGDEN CITY *et al.*, Defendants.

In this cause the motion of defendants for a new trial having heretofore been submitted to the court for consideration and decision and by the court taken under advisement, now on this day comes the court, and, being fully advised in the premises, denies the said motion, and defendants except.

WILLIAM H. KING,
Presiding Judge.

Dated March 18th, 1895.

306 In the District Court of the Fourth Judicial District, Territory of Utah, County of Weber.

J. C. ARMSTRONG, WILLIAM DRIVER, J. H. Spargo, George W. Murphy, John Broom, W. M. Chapman, and H. I. Griffin, Plaintiffs,
vs.
OGDEN CITY, W. H. TURNER, R. C. LUNDY, John McManus, M. N. Graves, Thos. D. Dee, H. W. Shurtliff, E. M. Allison, Jr., J. R. Elliott, F. J. Cannon, and James Calvert, Defendants.

Notice of Appeal to the Supreme Court of Utah Territory.

To J. C. Armstrong, William Driver, J. H. Spargo, Geo. W. Murphy, John Broom, W. M. Chapman, H. I. Griffin, plaintiffs above named, & to Evans & Rogers and Zane & Zane, their attorneys:

You and each of you will take notice that the defendants in the above-entitled action appeal to the supreme court of the Territory of Utah from the judgment made therein and entered in the district court of the fourth judicial district of said Territory on the 27th day of October, 1894, in favor of the plaintiffs and against the defendants herein and from the whole thereof; also that the defendants appeal to the supreme court of the Territory of Utah from an order made therein and entered in the said fourth district court of the fourth judicial district of said Territory on the 18th day of March,

1895, in favor of the plaintiffs and against the defendants herein, denying and overruling defendants' motion for a new trial in this cause.

J. N. KIMBALL AND
R. H. WHIPPLE,
Attorneys for Defendants.

Dated April 25th, 1895.

Service accepted and a true copy of the above notice of appeal duly acknowledged on this 25th day of April, 1895.

EVANS & ROGERS,
ZANE & ZANE,
Attorneys for Plaintiffs.

The filing of undertaking on appeal by the defendants herein, as provided by section 3635 of the Revised Laws of Utah, 1888, or any laws of this Territory, is hereby expressly waived this 25th day of April, 1895.

EVANS & ROGERS,
ZANE & ZANE,
Attorneys for Plaintiffs.

Filed Ap'l 25, 1895.
D. H. PEERY, *Clerk.*

307 We, the attorneys of record in this action, do hereby certify the foregoing to be a true and correct transcript of the record in this case, and that all papers therein set out are true and correct copies of all the papers on file and of record in this case.

EVANS & ROGERS,
ZANE & ZANE,
Attorneys for Plaintiffs.
J. N. KIMBALL,
R. H. WHIPPLE,
Attorneys for Defendants.

Signed this 30th day of April, 1895.

308 In the Supreme Court of the Territory of Utah.

J. C. ARMSTRONG *et al.*, Respondents,
vs.
OGDEN CITY *et al.*, Appellants.

Regular June term.

FRIDAY, *June 14th*, 1895.

This cause coming on regularly for hearing was argued by Mr. R. H. Whipple, for appellants, and by Mr. John M. Zane, in reply, was submitted, and taken under advisement.

Regular June term.

SATURDAY, *December* 21*st*, 1895.

This cause having been heretofore argued and submitted, and the court being sufficiently advised therein, it is now here ordered, considered, and adjudged that the judgment of the district court herein be, and the same is hereby, affirmed.

Regular June term.

MONDAY, *December* 30*th*, 1895.

In this cause motion having been heretofore made praying an appeal to the Supreme Court of the United States herein, and that the court fix the sum of the supersedeas and cost bonds to be given on such appeal, it is now ordered that such appeal as prayed be, and the same is hereby, allowed, and the penal sum of the supersedeas bond to be given thereon is hereby fixed in the sum of ten thousand dollars, and the bond for costs is fixed in the sum of three hundred dollars.

309 In the Supreme Court of Utah Territory.

J. C. ARMSTRONG and Others, Respondents,
vs.
OGDEN CITY and Others, Appellants.

Appeal from a judgment of the district court of the fourth district and from an order refusing a new trial.

The opinion states the facts.

Messrs. J. N. Kimball and R. H. Whipple, for the appellants.

Messrs. Zane and Zane and Evans & Rogers, for the respondents.

ROLAPP, *J.*:

This action was originally brought to enjoin the levying of a special assessment to pay the expenses of paving a portion of 25th street, in Ogden city, under the name of paving district No. 2. A demurrer to the complaint was filed in the court below and sustained. An appeal was taken to this court, and the judgment of the lower court reversed (Armstrong *vs.* Ogden City, 9 Utah, 255). Thereupon a supplemental complaint was filed by the plaintiffs for themselves and on behalf of certain other parties similarly situated to enjoin the further collection of the tax, and also to recover judgment against the city for the amount of taxes paid by them under protest.

The lower court found that the assessment was invalid because Ogden city never obtained jurisdiction to make the improvements contemplated, and perpetually enjoined the defendants from all proceedings under the ordinance creating paving district No. 2
310 and levying the tax for the improvement specified, and also directing that the plaintiffs recover the amounts paid by them

to the city under protest. A motion for a new trial was made and denied, and the appeal is taken both from the judgment and from the order denying a new trial. The facts are that on March 7th, 1892, the city council adopted and published a notice of intention, in which they designated the 29th day of March, 1892, at ten o'clock a. m., as the time to hear objections in writing from any and all persons interested in said local assessments. Before the appointed time at least 2,315 front feet abutting upon the street to be paved protested against the assessments. The city council did not act upon the protest at the time appointed, but adjourned from time to time until April 4th, 1892. It then appeared that in the meantime owners theretofore protesting had withdrawn from such protest sufficient front feet to make the protest contain, probably, less than one-half of the entire frontage in the said paving district. The entire frontage in the paving district was 3,960 feet, but this computation included 660 feet owned by the city and used for city-hall purposes. The city council thereupon, without publishing a new notice of intention, proceeded to change the paving from macadamizing, as specified in the notice, to asphaltum and sandstone and confined the competition to do the work to local residents of the city. On March 22nd, 1893, more than a year after the publication of the notice of intention, the city council adopted an ordinance creating paving district No. 2. The improvements were proceeded with, and in December, 1893, the plaintiffs paid the tax levied against their property under protest.

This court has already held that the original notice of intention was sufficient, and that if a proper protest was filed no jurisdiction was ever obtained by the city council of Ogden city to pro-
311 ceed with the assessment. (Armstrong *vs.* Ogden, 9 Utah, 255.)

The original notice of intention provided as follows: "The boundaries of the district to be affected and benefited are lines running 150 feet back and parallel with the outer lines of each side of the street on each and every block and for the full length therein." The street referred to is described in the notice as "25th street from the west line of Washington avenue to the west line of Wall avenue."

The statute requiring the notice of intention and prescribing the statements it shall contain where local improvements in a city are proposed is as follows:

"SEC. 13. In all cases, before the levy of any taxes for any improvements provided for in this act, the city council shall give notice of intention to levy said taxes, naming the purposes for which the taxes are to be levied, which notice shall be published at least twenty days in a newspaper published within such city. Such notice shall describe the improvements so proposed, the boundaries of the district to be affected, or benefited, by such improvements; the estimated cost of such improvements, and designate the time set for such hearing. If at or before the time so fixed, written objections to such improvement signed by the owners of one-half of the front feet abutting upon that portion of the street, lane, avenue or alley

to be so improved be not filed with the recorder, the council shall be deemed to have acquired jurisdiction to order the making of such improvements."

It is not claimed by appellant that at the time appointed in the notice of intention to hear these objections a majority of the front feet abutting upon the street in question had not filed such written objections, but appellant contends that the publication of the
312 notice of intention gave the city council jurisdiction, and that the attempt to dislodge that jurisdiction by a protest was a matter of judicial enquiry upon the part of the city council, and the fact of their having determined that a majority of the front feet abutting had not properly protested precluded any further attack upon that decision. This reasoning is absolutely fallacious. The statute plainly provides that if sufficient objections are not filed within the time required, "the city council shall be deemed to have acquired jurisdiction," and, of course, by rule of statutory jurisdiction it provides that if a sufficient protest has been filed, they fail to acquire jurisdiction, notwithstanding any decision the city council might arrive at to *to* the contrary. Two essential facts were necessary before the city council could acquire jurisdiction—first, that a proper and legal notice of intention had been published, and, second, that more than one-half of the front feet abutting upon the street to be improved had failed to object within the time specified. If these two requirements did not exist, no owner of property within the proposed paving district was concluded by the decision of the city council.

Ziegler *vs.* Hopkins, 117 U. S., 683.
Mulligan *vs.* Smith, 59 Cal., 206.

But appellants contend that even if the decision of the city council was not conclusive that it was a correct finding of fact. They admit that at the time appointed more than one-half of the front feet abutting upon the street had objected, but that the owners of a sufficient number of feet withdrew their protest, and that therefore the city council acquired jurisdiction to proceed with the improvement.

The statute above referred to sufficiently answers this conten-
313 tion. It expressly denies to the city council jurisdiction to proceed with the improvements if at the time fixed to hear objections a sufficient remonstrance is presented. At that time such a remonstrance was presented. The city council was thereby wholly deprived of power to proceed. No power could be subsequently acquired in that proceeding. A new proceeding might be instituted, and after due notice of intention new power could be obtained. The parties protesting and not withdrawing acquired a right to rely upon the statutes existing at the time appointed to hear objections, and were entitled to notice of any action affecting their interests. It may also be that others who desired to object refrained from so doing upon ascertaining that a sufficient protest was already filed.

Brewing Co. *vs.* Jersey City, 42 N. J. Law, 575.
State *vs.* Jersey City, 44 N. J. Law, 626.

Supposing that at the time appointed to hear objections less than one-half of the frontage abutting upon the street had protested, would it then have been seriously contended that thereafter and before the council acted upon the protest enough more protests could have been filed to defeat the improvement? If that could not have been done, clearly the reverse could not be done either.

But even granting that the contentions of appellants were either correct in law or true in fact, yet we think that the city council failed to acquire jurisdiction, because as a matter of fact more than one-half of the front feet abutting upon the street properly protested at all events. The total frontage of the district was 3,960 feet. The lowest number protesting after deducting withdrawals, as claimed by appellants, was 1,878½ feet, but included in the 3,960 feet were 660 feet owned by the city and used for city-hall purposes, which the city council claimed the right to count in favor of the
314 improving, notwithstanding it was excluded in the paving ordinance from the property upon which the paving tax was levied, and notwithstanding the entire estimated expense of $10,000.00 for the improvement was levied upon the remaining 3,300 feet by assessing $12.00 against each of these last-named front feet. If appellants' position were right, the statute permitting property-owners in local assessment districts to vote for or against any proposed improvement would become entirely inoperative, at all events so far as property-owners living in close proximity to public property are concerned. If, for instance, the city council should create a paving district out of the four portions of streets that surround a square used exclusively for city purposes, it would only be necessary to secure the consent of the owner of a single front foot of the property abutting upon the opposite side of the street from the public square to abstain from protesting, and the remaining frontage would not only be powerless to prevent the improvement, but would be compelled to pay practically the entire expense. Such a proceeding would only be the natural outgrowth of the actions exhibited by the appellants in this case, and would produce great injustice to property-owners subject thereto.

So far as proceeding with the improvement or assisting in acquiring jurisdiction are concerned, we have been unable to find any case where public property situated within the confines of a local improvement district has been permitted to affect the result either one way or the other, and we think that the establishment of such a rule would not only be wrong in principle and wrong in theory, but it would also be contrary to the spirit and intention of the statutes providing for special improvement assessments.

It is also insisted upon the part of appellants that respondents cannot recover the taxes paid by them under protest because
315 sec. 1, page 58, Session Laws 1890, provides that "any party feeling aggrieved by any such special tax or assessment or proceeding may pay the said special taxes assessed or levied upon his, her, or its property, or such installments thereof as may be due, at any time before the same shall become delinquent under protest and with notice, in writing, to the city collector that he intends to

sue to recover the same, which notice shall particularly state the alleged grievance and grounds thereof; whereupon such party shall have the right to bring a civil action within sixty days thereafter, and not later, to recover so much of the special tax as he shall show to be illegal, inequitable, and unjust, the cost to follow the judgment to be apportioned by the court as may seem proper, which remedy shall be exclusive." In this case respondents did not give the notice required nor did they commence action within sixty days after the taxes became delinquent. But this statute did not contemplate a case where the whole initiatory proceedings were absolutely void and where no jurisdiction had ever been acquired to commence the improvements or to levy the tax. This appears more clearly when the above provision is read in conjunction with the provision in the same section immediately preceeding what we have just quoted. That part of the section reads as follows: "No such special tax shall be declared void nor shall any assessment or part thereof be set aside in consequence of any error or irregularity committed or appearing in any of the proceedings under this act." In other words, if after having acquired jurisdiction the city council should have erroneously levied a larger tax than was necessary to pay for the improvement, or if the city council should have irregularly assessed more property against a person than he owned, then, of course, the party injured would be compelled to remedy such error or irregularity by giving a proper notice and commencing an action,
316 as in this section of the statute provided. But it cannot be maintained that where the tax was wholly void and illegal, as in this case, the parties injured were compelled to use this special and summary remedy, when the whole field of equitable relief was open to them. We think the proper remedy was employed in this action.

The record discloses many other grounds making the attempted improvement proceedings void and illegal, but it is unnecessary to discuss them in detail, as we deem the foregoing reasons decisive of the case. The judgment of the lower court is affirmed.

We concur:

MERRITT, *C. J.*

BARTCH, *J.*

317 UNITED STATES OF AMERICA, } ss:
Territory of Utah, }

In the Supreme Court of the Territory of Utah.

To James C. Armstrong, William Driver, J. H. Spargo, Samuel Chapman, administrator of the estate of William Chapman, deceased; Hester Broom, administratrix of the estate of John Broom, deceased; H. L. Griffin, Mathias Biel, Joseph Clark, Geo. W. Lashus, Lamoni Grix, Carl Sorenson, J. E. Horrocks, Ann Horrocks, J. S. Lewis, Lindsay R. Rogers, Patrick Healey, Joseph Morely, Zilpha J. Stephens, W. C. Warren, Almira C. Baker, D. H. Stephens, D. M. Stephens, Mary A. Stephens, Elizabeth Stephens, Ogden Union Depot Railway Company, a corporation; D. H. Peery, Jr., The Realty Company of Kittery, Me., a corporation; Carrie Lewis, and Geo. W. Murphy, appellees:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within sixty days from the date of this citation, pursuant to an appeal allowed in the supreme court of the Territory of Utah, wherein The Ogden City, a corporation, is appellant and you, the said James C. Armstrong, William Driver, J. H. Spargo, Samuel Chapman, administrator of the estate of William Chapman, deceased; Hester Broom, administratrix of the estate of John Broom, deceased; H. L. Griffin, Mathias Biel, Joseph Clark, Geo. W. Lashus, Lamoni Grix, Carl Sorenson, J. E. Horrocks, Ann Horrocks, J. S. Lewis, Lindsay R. Rogers, Patrick Healey, Joseph Morely, Zilpha J. Stephens, W. C. Warren, Almira C. Baker, D. H. Stephens, D. M. Stephens, Mary A. Stephens, Elizabeth Stephens, Ogden Union Railway Depot Company, a corporation; D. H. Peery, Jr., The Realty Company of Kittery, Me., a corporation; Carrie Lewis, and Geo. W. Murphy, are respondents, to show cause, if any there be, why the judgment rendered in said supreme court of Utah on the 21st day of December, 1895, should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Hon. Samuel A. Merritt, chief justice of the Territory of Utah, this 3rd day of January, A. D. 1896.

SAM'L A. MERRITT,
Chief Justice of Utah.

{ Seal Supreme Court Territory of Utah, United States of America. }

Attest: LEDYARD M. BAILEY,
Clerk Supreme Court of Utah Territory.

[Endorsed:] No. 598. Original. Ogden City, appellant, *vs.* J. C. Armstrong *et al.*, respondent-. Citation on appeal. R. H. Whipple, att'y for appellant. Filed Jan. 3, 1896. Ledyard M. Bailey, clerk supreme court Utah.

Due service of a copy of the within citation is hereby admitted this 3rd day of January, 1896, saving rights to object.

EVANS & ROGERS,
ZANE & ZANE,
Attorneys for Respondents.

318 In the Supreme Court of the United States.

OGDEN CITY, Municipal Corporation, Appellant,
vs.
JAMES C. ARMSTRONG, WILLIAM DRIVER, J. H. Spargo, Samuel Chapman, Administrator of the Estate of W. M. Chapman, Deceased; Hester Broom, Administratrix of the Estate of John Broom, Deceased; H. L. Griffin, Mathias Biel, Joseph Clark, Geo. W. Lashus, Lamoni Grix, Carl Sorenson, J. E. Horrocks, Ann Horrocks, J. S. Lewis, Lindsay R. Rogers, Patrick Healey, Joseph Morley, Zilpha J. Stephens, W. C. Warren, Almira C. Baker, D. H. Stephens, D. M. Stephens, Mary A. Stephens, Elizabeth Stephens, Ogden Union Depot & R'y Company, a Corporation; D. H. Peery, Jr., The Realty Company of Kittery, Maine, a Corporation; Carrie Lewis, and Geo. W. Murphy, Appellees.

Assignment of Errors.

1. The court erred in allowing the witness L. R. Rogers to testify, over defendants' objection, that H. Madden hald a declaration of trust for his brother, Elwood Madden, to an undivided interest in a lot abutting on the said paving district, and for that reason had authority to object to the improvements for said Elwood Madden, because such testimony is immaterial and incompetent.

2. The court erred in rendering judgment in favor of the plaintiffs and against the defendants.

3. The court erred in rendering judgment in favor of Samuel Chapman, administrator of the estate of William Chapman, deceased, for the reason that said Samuel Chapman, as such administrator or otherwise, had never been substituted as plaintiff or made plaintiff in this case by substitution or otherwise.

4. The court erred in rendering judgment against the defendants and in favor of the plaintiff Hester Broom, administratrix of
319 the estate of John Broom, deceased, for the reason that the said Hester Broom, as such administratrix, was not a party to this action by substitution or otherwise.

5. The court erred in holding that the owners of one-half the frontage in feet on Twenty-fifth street and within said paving district filed objections to making the improvement complained of or in fact any improvement or at all for the reason that the evidence plainly shows that no objections to such improvement were ever filed with the recorder on or before 10 a. m. March 29th, 1892, as

provided in the notice of intention to improve and pave the said street and in accordance with law, or otherwise or at all.

6. The court erred in holding that a sale of plaintiffs' property in order to enforce the collection of the said assessment and tax would cast a cloud upon plaintiffs' title to the several tracts of land in the complaint described for the reason that if the said tax was invalid and void the sale of land to satisfy an illegal or invalid tax would not cast a cloud upon plaintiffs' titles.

7. The court erred in holding that the plaintiffs had and have no plain, speedy, and adequate remedy at law because section 1, chapter 41, of the Laws of the Twenty-ninth Legislative Assembly of Utah, approved March 13, 1890, provides how and when such payments shall be made and when action may be brought to recover same if found to be illegal, inequitable, and unjust.

8. The court erred in holding that Ann Horrocks, Joseph Morley, H. L. Griffin, or Geo. W. Kerr, guardian of the Nichols heirs, and William Driver had ever signed the so-called original protest which it is claimed by plaintiffs was filed with the city recorder protesting against the levying of any local assessment upon the property in said district No. 2 on March 29th, 1892, at 9.55 a. m., or any
320 protest filed at the said time or at all for the reason that said names or neither of them appear upon the said original protest introduced in evidence and marked "Def'ts' Ex. P."

9. The court erred in holding that the defendant Ogden City, in pursuance of an ordinance passed March 22nd, 1893, was about to expose the real estate described in the supplemental complaint for sale to satisfy an illegal assessment imposed by said ordinance, and that the parties plaintiff in this action, after said property had been advertised for sale and was about to be sold to satisfy such illegal assessment then due, paid under protest to said Ogden City the following amounts, to wit:

J. C. Armstrong, $95.04; Mathias Biel, $63; Joseph Clark, $48; Samuel Chapman, for the William Chapman estate, $49.20; Joseph Clark, for Clark, Emmet & Thompson, $30; William Driver, $60; H. L. Griffin, $23.75; Lamoni Grix, $24.90; Ann Horrocks & James E. Horrocks, $124.80; Geo. W. Lashus, $60; H. D. & J. S. Lewis, $82.08; Carrie Lewis, $30; Joseph Morley, $36; Patrick Healey, for Patterson & Healey, $30; Joseph Clark, for Patterson & Clark, $60; L. R. Rogers, $74.04; J. H. Spargo, $48; D. M. Stephens, $14.70; Carl Sorenson, $24.40; W. C. Warren, $48; Geo. M. Kerr, guardian for Nichols heirs, $160.08; D. H. Peery, Jr., $24; Realty Co. of Kittery, Me., $248.80; Job Pingree, $35.40; Ogden Union Depot & R'y Company, a corporation, $118.80; Geo. W. Murphy, $154.20, for the reason that the evidence did not and does not show that said assessments were illegal, or, if illegal, the evidence did not and does not show that a sale of said property would cast a cloud upon the title.

10. The court erred in failing to find that plaintiffs' supplemental complaint is not a supplemental complaint for the reason that the said supplemental complaint does not state facts sufficient to constitute a supplemental complaint and does not state anything ad-

ditional or amendatory to the original complaint of J. C. Armstrong *et al. vs.* Ogden City *et al.*, filed herein May 22nd, 1892, and
321 that the said pretended supplemental complaint does not state any matter consistent with or in aid of the said original complaint, but states or attempts to state a new cause or causes of action and asks other and different relief and attempts to change the nature and object of the original action, and that the said supplemental complaint brings in other and different parties plaintiff, whose rights, if any they have, are other and different from those of the original plaintiffs at date of filing the original complaint or now and who are and were not interested parties by the allegations in the said original complaint.

11. The court erred in failing to find upon all the issues raised by the pleadings in this:

(*a.*) The court erred in failing to find upon the issue raised by the defendants' answer that the cause of action of the plaintiffs and each and every cause of action of each and every one of the plaintiffs in the supplemental complaint for the recovery of taxes paid under the so-called protest is barred by the provisions of section 1, chapter 41, of the Laws Passed by the Twenty-ninth Session of the Legislative Assembly of the Territory of Utah, approved March 13, 1890.

(*b.*) The court erred in failing to find upon the issue raised by the answer that there is a misjoinder of parties plaintiff in this: That in truth and in fact that each one of the said plaintiffs is a separate and independent person, and their action or cause of action, if any they have, is to each separate and independent, requiring of this court the rendering of a separate and independent judgment for the amount claimed by each and every one of the plaintiffs; that each of the said plaintiffs is suing the defendants on a demand for money, the amount being specifically stated, and that each and every one of such claims and demands is for a different amount.

(*c.*) That the court erred in failing to find upon the issue raised by the answer that there is a misjoinder of causes of action
322 in the said supplemental complaint in this: That said supplemental complaint contains causes of action which are not separately stated and cannot properly be united, and that they are mingled and commingled and combined in the same allegation; in other words, said supplemental complaint sets forth but one cause of action, while in reality it embraces numerous causes of action, all for different amounts and in favor of different persons, and that each of said causes of action is not separately stated or separately set out in a separate cause or count in said complaint, and that the several causes of action as therein alleged do not affect all the plaintiffs alike, and that no one of said plaintiffs is in any way interested in the claim sued upon by any one of the other plaintiffs, but that the demand of each plaintiff, as well as the relief sought by him, is separate and independent to himself, and that said several causes of action do not affect all the parties to the action and are not claims or demands or causes of action against all the defendants.

(*d.*) The court erred in failing to find upon the issue of estoppel

raised by the defendants' amended answer to the supplemental complaint in this: That the plaintiffs named in the supplemental complaint had full knowledge before and at the time that the said pavement was being constructed, and that the said assessment complained of was being and had been made, and that the contract complained of was being and had been let, and that the city, defendant herein, was about to and was expending large amounts of money in constructing and paving said street, and that they, having such knowledge, took no legal steps to stop the said work or to question the proceedings of the city council until this supplemental complaint was filed in this court—several months after the work had been accepted by the city council as complete and after the said city had fully paid for the said work; having thus stood by and in silence as to the levy of said assessment, the construction of said
323 work, and the acceptance of the same by the city and the city having fully paid for it, the defendants were thus estopped to complain.

11 (2). The court erred in allowing the witness Joseph Clark, over the objection of the defendant-, to testify that Geo. W. Murphy claimed to own property on Twenty-fifth street, because that is not the proper wat to prove title and ownership; that Scudder & Carlson occupied and were in possession of land on Twenty fifth street, because title and ownership cannot be proved that way and because same was immaterial; that he was one of the owners named "Clark, Emmet & Thompson," because an objection signed "Clark, Emmet & Thompson" would not be evidence to the city council that the land was owned by Joseph Clark, R. W. Emmet, and James Thompson; that he knew about Joseph Pingree owning property, because he occupied a lot and claimed to own it, because it was immaterial; that Geo. W. Kerr, C. F. Taylor, W. C. Warren, Charles F. Krouch, Mary A. Stephens, D. M. Stephens, S. C. Stephens, H. D. and J. S. Lewis, John Maguire, D. H. Peery, Jr., Sarah E. Binford, J. H. Watkins, E. J. Watkins, Fred. J. Kiesel, Carl Sorenson, Willard Kay, Lamoni Grix, Joseph Morely, John Broom held title to real estate on Twenty-fifth street, because such evidence was wholly incompetent and immaterial.

12. The court erred in allowing James H. Spargo, a witness, to testify over defendants' objection, that J. H. Spargo, John Maguire, D. H. Peery, Sarah E. Binford, Carl Sorenson, J. E. Horrocks, Ann Horrocks, Reese Howell, J. H. Watkins, Rosa Kasten, Morris Livingston, Willard Kay, Lamoni Grix, Joseph Morely, and John Broom owned land abutting on dist. No. 2 on Twenty-fifth street, because such evidence is incompetent and immaterial.

13. The court erred in allowing the witness J. C. Armstrong, over defendants' objection, to testify that Geo. W. Murphy, Scudder & Carlson, Job Pingree, Mathias Biel, John M. Major, Adam Patterson, John A. Morrison, Rebecca McKee, William Driver, William Chapman, Charles Coonley, Geo. M. Kerr were in possession
324 of land abutting on Twenty-fifth street and *and* within said paving district No. 2 on March 29th, 1892, because same was immaterial and incompetent.

13. The court erred in allowing the witness D. H. Peery, Jr., to testify that he signed a protest for the Boston Realty Company without first producing his authority so to do. The court erred in holding that the said D. H. Peery, Jr., had authority to sign a protest for the Boston Realty Company, L. P. Birchfield, and the names "Evans, Rogers, and Peery" over the objection of the defendant made at the time. The court erred in holding that D. H. Peery, Jr., being a joint tenant, could sign a protest for the other joint tenants, David Evans and L. R. Rogers. Such signing would not be notice that David Evans and L. R. Rogers had protested.

15. The court erred in allowing the witness L. R. Rogers to testify, over defendants' objection, that he signed the name of H. Madden and the name of E. Madden to the so-called protest or objection, and that after the city council had acted thereon the said H. Madden and E. Madden ratified what the said witness had done in previously signing their names without authority.

16. The court erred in allowing the witness L. R. Rogers to testify, over defendants' objection, that he signed the name of David Evans to the so-called protest without showing proper authority to do so; also in testifying that Mr. Evans ratified the act after the city council had acted upon the so-called protest so signed without authority.

17. The court erred in allowing the witness Geo. W. Kerr to testify, over defendants' objection, that he signed the so-called protest by permission of the children, as the same was immaterial and incompetent.

18. The court erred in not striking out all of the testimony of the witnesses D. H. Peery, Jr., L. R. Rogers, and Geo. W. Kerr, on motion of the defendant- so to do, for the reason that it was
325 not shown that they or either of them were the agents of the owners of the property which they represented by signing the so-called protest or had any legal authority to sign any protest.

19. The court erred in allowing the witness Charles R. Reid to testify, over defendants' objection, that he signed the name of C. Fitzgerald to the so-called pro'est, because the evidence shows that he did not have authority to do so.

20. The court erred in allowing the plaintiffs, over defendants' objection, to amend the complaint by inserting the name of Ann Horrocks, and also in changing the name of "A. J. Morrison" to "J. A. Morrison;" also the name of "M. J. Warner" to that of "M. A. Warner," because the defendant- *was* thus taken by surprise and thus unable to successfully defend.

21. The court erred in refusing to strike out, on motion of the defendant- so to do, from the so-called protest the name of C. Fitzgerald, because it was shown that he never signed the same nor did any one sign for him.

22. The court erred in allowing S. C. Stephens, over defendants' objection, to testify that he signed the names of D. M. Stephens, J. S. Stephens, D. H. Stephens, and John Pincock to the so-called protest for the reason that the plaintiffs did not establish an agency

in S. C. Stephens for the owners of the property, or any authority in said witness to sign said persons' names to that or any protest or objection.

23. The court erred in allowing the witness B. H. Goddard to testify, over defendants' objection, that he signed the so-called protest for and in behalf of the quorum of seventies, the evidence showing that he had no authority so to do; and the court also erred in refusing to strike out the evidence of said witness, on motion of defendant- so to do, that the ratification, if any, came after the city council had acted upon the protest, and for the further reason that the plaintiffs did not establish an agency in the witness Goddard for his principal.

326 24. The court erred in allowing the witness Geo. W. Murphy to testify, over defendants' objection, that he saw J. M. Major sign the so-called protest for himself and Mrs. Butterworth, for the reason that it was not shown that the said Major had any authority to sign for Mrs. Butterworth, and because the same is immaterial and not the best evidence.

25. The court erred in allowing the witness Geo. W. Murphy, over defendants' objection, to testify that he saw other names than his own upon the so-called protest, for the reason that simply seeing the name of a person signed to a protest is no evidence that the person signed the same, or that the name was put there by another having authority, and is immaterial and is not the best evidence.

26. The court erred in allowing the witness J. C. Armstrong to testify, over defendants' objection, that one O. E. Hill was the agent for C. F. Taylor and in that way had authority to sign the name of C. F. Taylor to the so-called protest, and was an attempt to establish an agency by the declarations of the agent, and the court erred in refusing to strike out all the evidence of such witness, on motion of defendant- so to do, for the reason that it did not tend to establish an agency in the said O. E. Hill to sign the said C. F. Taylor's name to the protest.

27. The court erred in refusing to strike out the testimony of the witness Joseph Clark, on defendants' motion so to do, to the effect that he signed the protest as "Clark and Patterson," when in fact the testimony shows that the land signed for was of record in the name- of Joseph Clark and Adam Patterson, for the reason that the signature to the paper which purports to be a protest and signed "Clark and Patterson" would not be evidence of ownership to the city council unless the name of each owner was fully signed, and because it was immaterial and incompetent.

327 28. The court erred in refusing to strike out, upon defendants' motion, that part of the testimony of Joseph Clark in which he testifies that he signed the name of "Clark, Emmet and Thompson" to the paper which purports to be a protest, when in fact the land was and is of record in the name- of Joseph Clark, W. R. Emmett, and James Thompson, for the reason that the so-called protest, signed "Clark, Emmett and Thompson," would not be notice to the city council that Joseph Clark, W. R. Emmett, and James Thompson had protested for the frontage owned by them.

29. The court erred in allowing the witness John A. Boyle to testify, over defendants' objection, that one Healey told him to sign for Patterson, and that because of that he signed the name- "Boyle and Patterson" to the so-called protest purporting to represent land fronting on Twenty-fifth street, which was of record in the name-of Geo. Driver, Adam Patterson, Patrick Healey, and John A. Boyle, and the court erred in refusing to strike out such evidence, on motion of defendant-, on the ground that an agent cannot delegate his authority, the evidence being incompe-nt and immaterial, and for the further reason that the protest, being signed "Boyle and Patterson," would not be notice to the city council that Geo. Driver, Adam Patterson, Patrick Healey, and John A. Boyle had protested for lands owned by them.

30. The court erred in allowing the witness Lindsley to testify on part of the plaintiff-, over the objection of the defendant-, to contradict and impeach the testimony of Mr. Krouch, the plaintiffs' own witness. The court erred in allowing the plaintiff- to impeach his own witness by introducing another witness to contradict him, over defendants' objection.

31. The court erred in allowing the protest under which certain of the plaintiffs paid the first installment of the tax and which was directed to C. M. Brough, treasurer of Ogden city, to be introduced in evidence, over defendants' objection, so far as it relates to
328 the letting of the contract or limiting bidders to *bona fide* residents of Ogden city; second, so far as it relates to the notice of intention to create paving district, for the reason that the supreme court of this Territory has passed upon this notice and held it good; also, so far as it relates to the fact that no special fund out of which the pavement should be paid for was provided for; and, third, so far as the names appearing upon the said protest are represented by attorneys, agents, and administrators, without first showing their authority to so represent them, because it was in that respect immaterial and incompetent.

32. The court erred in allowing the plaintiff- to introduce, over defendants' objection, the protest signed "Realty Company of Kittery, Me., by D. H. Peery, Jr., agent," and addressed to Willis T. Beardsley, Esq., city auditor, Ogden city, Utah—first, because said protest was directed to the city auditor and it should have been directed to the city collector; second, because said protest nowhere states that suit will be brought to recover the taxes thus paid, as provided by law.

33. The court erred in allowing the plaintiff- to introduce, over the objection of the defendant-, the protest signed "D. H. Peery, Jr.," and addressed to Willis T. Beardsley, Esq., city auditor, Ogden city, Utah—first, because the same was directed to the city auditor and it should have been directed to the city collector; second, that said protest nowhere states that suit will be brought to recover the taxes so paid, as provided by law.

34. The court erred in striking out, over defendants' objection, and not considering withdrawals offered in evidence by the defend-

ant-, and which had been filed with the city recorder of Ogden city prior and up to 10 a. m. March 29th, 1892.

35. The court erred in striking out and not considering withdrawals introduced in evidence by defendant- and filed with the city recorder after 10 o'clock a. m. March 29th, 1892, and before
329 the city council had acted upon the protest or objection to the improvement or assessment.

36. The court erred in ordering, upon its own motion and over defendants' objection, that all secondary evidence with respect to withdrawals heretofore adduced be stricken out.

37. The court erred in holding that the signatures "Clark and Patterson" on the original protest against levying any local assessment upon property belonging to Joseph Clark and Adam Patterson, and which purports to have been filed with the city recorder at 9.55 a. m., March 29th, 1892, was sufficient notice to the city council that Joseph Clark and Adam Patterson had protested or objected to the improvement which affected land abutting upon said street and district the title of which at that time was and still is of record in the name- of Joseph Clark and Adam Patterson and was then and still is owned by them.

38. The court erred in holding that the signatures "Clark, Emmet and Thompson" on the original protest against levying any local assessment, and which purports to have been filed with the city recorder at 9.55 a. m., March 29th, 1892, was sufficient notice to the city council that Joseph Clark, W. R. Emmet, and James Thompson had protested or objected to the improvement which affected lands abutting upon said street and district — which was at the time of record in the name- of Joseph Clark, W. R. Emmet, and James Thompson and was at that time owned by them.

39. The court erred in holding that the signature "Scudder and Carlson" on the original protest against levying of any local assessment, and which purports to have been filed with the city recorder at 9.55 a. m., March 29th, 1892, was sufficient notice to the city council that William A. Scudder and Joseph Carlson had protested or objected to the improvement which affected lands abutting
330 upon 25th street and within said district the title of which was at the time in the name- of William A. Scudder and Joseph Carlson and was at that time owned by them.

40. The court erred in holding that the signature "Geo. M. Ceer," or "Cur," "administrator," on the original protest against levying any local assessment, and which purports to have been filed with the city recorder at 9.55 a. m., March 29th, 1892, was sufficient notice to the city council that Geo. M. Kerr, guardian, had protested or objected to the improvement which affected land abutting upon said street and within said paving district the title of which was at that time of record in the name- of John Nichols, Garner Nichols, Jane A. Nichols, Rose Nichols, and Leslie Nichols and was at that time owned by them.

41. The court erred in holding that the signature "Boyle and Patterson" on the original protest against levying any local assessment, and which purports to have been filed with the city recorder

at 9.55 a. m., March 29th, 1892, was sufficient notice to the city council that John A. Boyle and Adam Patterson had objected or protested to the improvement which affected land abutting upon said street and within said district the title of which was at the time in the name of John A. Boyle and Adam Patterson and is still owned by them.

JAMES N. KIMBALL,
R. H. WHIPPLE,
Attorneys for Defendants and Appellants.

Endorsed: 598. Ogden City *vs.* Armstrong *et al.* Assignment of errors on appeal to S. C. U. S. Filed Jan. 3, 1896. Ledyard M. Bailey, clerk supreme court, Utah.

331 In the Supreme Court of Utah Territory.

Know all men by these presents that we, Ogden City, a municipal corporation, in Weber county, Utah Territory; Fred. J. Kiesel, C. M. Brough, R. H. Whipple, H. C. Wardleigh, and M. N. Graves, of Ogden city, Weber county, Utah Territory, are held and firmly bound unto James C. Armstrong, William Driver, J. H. Spargo, Samuel Chapman, as administrator of the estate of William Chapman, deceased; Hester Broom, administratrix of the estate of John Broom, deceased; H. L. Griffin, Mathias Beal, Joseph Clark, George W. Lashus, Lamoni Grix, Carl Sorenson, J. E. Horrocks, Ann Horrocks, J. S. Lewis, Lindsay R. Rogers, Patrick Healy, Joseph Morley, Zilpha J. Stephens, W. C. Warren, Almira C. Baker, D. H. Stephens, D. M. Stephens, Mary A. Stephens, Elizabeth Stephens, Ogden Union R'y & Depot Company, a corporation; D. H. Peery, Jr.; The Realty Company of Kittery, Maine, a corporation; Carrie Lewis, George W. Murphy, in the sum of ten thousand five hundred dollars ($10,500.0-) lawful money of the United States, to be paid to the said James C. Armstrong, William Driver, J. H. Spargo, Samuel Chapman, as administrator of the estate of William Chapman, deceased; Hester Broom, administratrix of the estate of John Broom, deceased; H. L. Griffin, Mathias Beal, Joseph Clark, George W. Lashus, Lamoni Grix, Carl Sorenson, J. E. Horrocks, Ann Horrocks, J. S. Lewis, Lindsay R. Rogers, Patrick Healy, Joseph Morley, Zilpha J. Stephens, W. C. Warren, Almira C. Baker, D. H. Stephens, D. M. Stephens, Mary A. Stephens, Elizabeth Stephens, Ogden Union R'y & Depot Company, a corporation; D. H. Peery, Jr.; The Realty Company of Kittery, Maine, a corporation; Carrie Lewis, and George W. Murphy, their executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, administrators, and successors, firmly by these presents.

Sealed with our seals and dated this 31st day of December, 1895, at Ogden, Utah.

Whereas the above-named Ogden City hath prosecuted an appeal to the Supreme Court of the United States to reverse the judgment

rendered by the supreme court of the Territory of Utah in a certain action, wherein the said James C. Armstrong, William Driver,
332 J. H. Spargo, Samuel Chapman, as administrator of the estate of William Chapman, deceased; Hester Broom, administratrix of the estate of John Broom, deceased; H. L. Griffin, Mathias Beal, Joseph Clark, George W. Lashus, Lamoni Grix, Carl Sorenson, J. E. Horrocks, Ann Horrocks, J. S. Lewis, Lindsay R. Rogers, Patrick Healy, Joseph Morley, Zilpha J. Stephens, W. C. Warren, Almira C. Baker, D. H. Stephens, D. M. Stephens, Mary A. Stephens, Elizabeth Stephens, Ogden Union R'y & Depot Company, a corporation; D. H. Peery, Jr.; The Realty Company of Kittery, Maine, a corporation; Carrie Lewis, and George W. Murphy were plaintiffs and respondents and Ogden City, William H. Turner, R. C. Lundy, John McManis, H. H. Spencer, M. N. Graves, Thomas D. Dee, H. W. Shurtliff, E. M. Allison, Jr., J. R. Elliott, F. J. Cannon, and James A. Calvert were defendants and appellants:

Now, therefore, the condition of this obligation is such that if the above-named Ogden City shall prosecute its appeal to effect and answer all costs and damages if it shall fail to make good its appeal, then this obligation shall be void; otherwise to remain in full force and virtue.

OGDEN CITY, *a Corporation.*
By R. H. WHIPPLE,
Its City Attorney.

FRED. J. KIESEL. [SEAL.]
C. M. BROUGH. [SEAL.]
R. H. WHIPPLE. [SEAL.]
H. C. WARDLEIGH. [SEAL.]
M. N. GRAVES. [SEAL.]

Signed, sealed, & delivered in the presence of—
RICHARD HILL.
JNO. C. CHILD.

Approved this 3rd day of January, 1896.
SAM'L A. MERRITT,
Chief Justice Territory of Utah.

333 In the Supreme Court of the Territory of Utah.

UNITED STATES OF AMERICA, }
Territory of Utah, } *ss*:

I, Ledyard M. Bailey, clerk of the supreme court of Utah Territory, in pursuance of an appeal allowed in the case of J. D. Armstrong *et al.*, respondents, against Ogden City, a municipal corporation, *et al.*, appellants, lately pending in said court, do return attached hereto a transcript of the record and proceedings, opinion, bond, and affidavits of value of matter in dispute, together with the original citation, all in and of said court and cause, to the Supreme Court of the United States; and I hereby certify that said attached

transcript of said record and proceedings
davits is a full, true, and complete copy
thereof on file or of record in my office.

In testimony whereof I hereunto set
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Seal Supreme Court, Territory of Utah, United States of America.

LEDYA
Clerk of the

Endorsed on cover: Case No. 16,184. court. Term No., 127. Ogden City, app strong, William Driver, J. H. Spargo, *et* 1896.

gs, opinion, bond, and affi-
py of the several originals

t my hand and affix the
id supreme court, at Salt
this third day of January,
r of our Lord one thousand
dred and ninety-six.

ARD M. BAILEY,
he Supreme Court of Utah.

. Utah Territory supreme
ppellant, *vs.* James C. Arm-
t al. Filed February 8th,

No. 127.

Brief of Kimball for Appt.

FILED.
OCT 23 1897
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

Filed Oct. 23, 1897.

OCTOBER TERM, 1897.

NO. 127.

OGDEN CITY, APPELLANT,

vs.

JAMES C. ARMSTRONG, WILLIAM DRIVER, J. H. SPARGO ET. AL.

APPEAL FROM THE SUPREME COURT OF UTAH TERRITORY.

APPELLANT'S BRIEF.

R. H. WHIPPLE,
T. D. JOHNSON,
Attorneys for Appellant.

JAMES N. KIMBALL,
Of Counsel.

EVENING PRESS PRINT--OGDEN.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

OGDEN CITY, APPELLANT,

vs.

JAMES C. ARMSTRONG, WILLIAM DRIVER, J. H. SPARGO ET. AL.

APPEAL FROM THE SUPREME COURT OF UTAH TERRITORY.

APPELLANT'S BRIEF.

STATEMENT.

This action was originally brought by the plaintiffs James C. Armstrong, William Driver, J. H. Spargo, Geo. W. Murphy, John Broom, W. M. Chapman and H. L. Griffin to enjoin the levying of a special assessment to pay the expense of paving a portion of Twenty-fifth street in Ogden City, Utah, known as

District Number 2 (see complaint record pages 1 to 10.) These plaintiffs allege that Ogden City had, through its common council, created such paving district and had published a notice of intention to pave the same, setting out the notice of intention in full (record page 2); that in said notice of intention, March 29, 1892, at 10 o'clock a. m., was fixed as the date when the council would hear objections in writing from any and all persons interested in said assessment; that on that date, viz: March 29, 1892, at 9:55 o'clock a. m., owners of more than one-half of the frontage in feet within said district had filed such objections protesting against the levying of any local assessment against or upon their property for the purpose of paving said street within said district; that notwithstanding said objection, the mayor and common council were about to and would pass an ordinance levying such an assessment and would let a contract for paving said street and district, and that unless enjoined would levy such assessment and let such contract; that the levying of said assessment would create a lien and cloud upon plaintiffs' title; that the entering into said contract for doing said work, "*if illegal* and *void*," would engender Ogden City and the plaintiffs and all others similarly situated, in a multiplicity of suits and that

great and irreparable injury would result thereby; that the plaintiffs have no plain, speedy and adequate remedy at law.

A demurrer to this complaint was filed in the Court below and sustained. An appeal from this order was taken to the Supreme Court of Utah territory and the judgment of the lower Court was reversed. Pending the appeal, however, the common council levied the assessment complained of and collected the first installment of the tax. After the case was remanded to the Court below, the other plaintiffs about thirty in number, (see record page 202) filed their supplemental complaint (record pages 15 to 19) to enjoin the further collection of the tax which had been levied in ten equal annual installments, and also, to recover judgment against the City for each of the separate amounts of the tax, that each of the said supplemental complainants had paid under a so-called protest (record pages 113 and 114.)

In the supplemental complaint it is alleged that the complainants have a common interest with the plaintiffs in the original complaint; and they allege that each is the owner of a separate and distinct piece of property abutting upon said improvement (record pages 15, 16 and 17); that after the commencement of the

original suit, the common council, on March 22, 1893, had passed the ordinance sought to be restrained in the original complaint (record page 8), and made said ordinance a part of the supplemental complaint, which ordinance they allege "*is and was invalid;*" that in pursuance of said invalid ordinance and unauthorized and invalid proceedings, Ogden City, its officers and agents, were about to expose the real estate described in the original and supplemental complaint for sale to satisfy said illegal assessment, and threatened to continue to sell the said real estate annually for ten years, as each installment of the said tax becomes due.

That said plaintiffs and each and all of said plaintiffs protested against the sale of their property, and the creation of a cloud upon their respective titles, but that said City of Ogden, and its officers and agents, with the defendants, insisted upon said sale, and that said plaintiffs and each and all of them were by said defendants compelled to pay the amounts hereinafter alleged as having been paid, to prevent the sale of their said property, and prevent a cloud upon their respective titles, to-wit: That said J. C. Armstrong was compelled to pay the said City of Ogden the sum of $95.04; Mathias Biel, $63; Joseph Clark, $48; Samuel Chapman, for the estate of William Chapman, $49.20; Joseph

Clark, for Clark, Emmett & Thompson, $30; William Driver, $60; H. L. Griffin, $23.76; Lamoni Grix, $24.90; Ann Horrocks, $62.40; James E. Horrocks, $62.40; George W. Lashus, $60; H. D and J. S. Lewis, $82.08; Carrie Lewis, $30; Joseph Morley, $36; Joseph Clark, for Patterson & Clark, $60; L. R. Rogers, $74.04; J. H. Spargo, $48; W. H. Stephens, $14.70; Carl Sorenson, $20.40; W. C. Warren, $48; and the Nicholas estate, $160.08, by George M. Kerr, administrator of said estate; D. H. Peery, Jr., $24; Realty Company of Kitteny, Maine, a corporation, $748.80; Job Pingree, $35.40; George W. Murphy, $154.20; and Ogden Union Depot and Railway Company, a corporation, $1,188.

That the real estate belonging to the other plaintiffs than these just hereinbefore named was sold by said Ogden City to satisfy the said illegal assessment.

That inasmuch as plaintiffs and each of them are without any speedy and adequate remedy at law for the wrongs in the action alleged, the plaintiffs ask, as they have prayed in the said original complaint and in this supplemental complaint, that said defendants and each of them may be required by this court to make true, specific and full answer to all and singular the allegations aforesaid, and that this

Court will decree that said ordinance and said proceedings thereunder be null and void and of no effect; and in order that the plaintiffs may have justice they further pray that an account may be taken of the amounts paid by them respectively to said Ogden City, its officers and agents, and that said Ogden City and the other defendants, as they shall appear to be liable, may be decreed to pay to the respective parties such amounts as it shall appear they are entitled to, and that the sales of real estate heretofore made may be set aside and annulled and that the Court will grant said plaintiffs and each of them such further relief as shall appear to be just and as to equity appertains.

Ogden City answered the original complaint (record pages 10 to 14) and also the supplemental complaint, (record pages 19 to 25) specifically denying all the allegations therein contained; denied that the plaintiffs or any of them are without any plain, speedy and adequate remedy at law for the said alleged wrongs; that the plaintiffs are estopped because they stood by in silence while the City was constructing the work and until the City had fully paid for it and for that reason cannot now overthrow the proceedings of the City Council and thus escape payment of the said

local tax assessed against their property (records page 23); that the supplemental complaint does not state facts sufficient to constitute a supplemental complaint and does not state anything additional or amendatory to the original complaint, and does not state matters consistent with nor in aid of such original complaint but states or attempts to state a new cause of action and asks other and different relief and attempts to change the nature and object of the original complaint; that the cause of action of the plaintiffs in the supplemental complaint and each and every cause of action of each and every of the said plaintiffs, is barred by the provisions of section 1, chapter 41 Laws Twenty-ninth Legislative Assembly, Utah, approved March 13, 1890, (record page 24); that there is a misjoinder of parties plaintiff in that each one of said plaintiffs is a separate and independent person and the cause of action is to each, separate and independent, requiring of the Court the rendering of a separate and independent judgment for the amount claimed by each and every one of said plaintiffs; that each of said plaintiffs in the supplemental complaint is suing the defendant on a demand for money, the amount being specifically stated, and that each and every one of such claims and demands is for a different amount.

That there is a misjoinder of cause of action in said supplemental complaint in this: That the said supplemental complaint contains causes of action which are not separately stated and cannot properly be united and that they are mingled and combined in the same paragraph; in other words, said supplemental complaint sets forth but one cause of action when in reality it embraces numerous causes of action as follows:

A cause of action in favor of J. C. Armstrong against defendants for the sum of $95.04; a cause of action in favor of Mathias Biel against defendants for the sum of $63; a cause of action in favor of Joseph Clark against defendants for the sum of $48; a cause of action in favor of William Chapman against defendants for the sum of $49.20; a cause of action in favor of Clark, Emmett & Thompson against defendants for the sum of $30; a cause of action in favor of William Driver against defendants for the sum of $60; a cause of action in favor of H. L. Griffin against defendants for the sum of $23.76; a cause of action in favor of Lamoni Grix against defendants for the sum of $24.90; a cause of action in favor of Ann Horrocks against defendants for the sum of $54.60; a cause of action in favor of James E. Horrocks against defendants for the sum of $54.60; a

cause of action in favor of George W. Lashus against defendants for the sum of $60; a cause of action in favor of H. D. and J. S. Lewis against defendants for the sum of $82.08; a cause of action in favor of Carrie Lewis against defendants for the sum of $30; a cause of action in favor of Joseph Morley against defendants for the sum of $36; a cause in favor of Patterson & Clark against defendants for the sum of $60; a cause of action in favor of Patterson & Healy against defendants for the sum of $30; a cause of action in favor of L. R. Rogers against defendants for the sum of $73.04; a cause of action in favor of J. H. Spargo against defendants for the sum of $48; a cause of action in favor of W. H. Stephens against defendants for the sum of $14.70; a cause of action in favor of Carl Sorenson against defendants for the sum of $20.40; a cause of action in favor of W. C. Warren against defendants for the sum of $48; a cause of action in favor of the Nicholas estate against defendants for the sum of $160.08; and that each of said causes of action is not separately stated or set out in a separate clause or count in said complaint, and that said several causes of action as therein alleged do not effect all the plaintiffs therein alike, and that no one of said plaintiffs is in any way interested in the claim sued upon by any one of the

other plaintiffs, but that the demand of each plaintiff, as well as the relief sought by him, is separate and independent to himself. And that such several causes of action, if any cause of action said plaintiffs or any one of them have, do not effect all the parties to the action and are not claims or demands or causes of action against all the defendants.

COUNCIL PROCEEDINGS.

On March 9, 1892, the City Council of Ogden City, Utah, caused a notice of intention to pave the district in question, to be published in the Ogden Daily Standard of Ogden City for the full time required by law and in words and figures following to-wit: (Record pages 7 and 8.)

"NOTICE OF INTENTION

"Of the City Council of Ogden City of creating a district for paving and of paving and macadamizing the streets therein and to defray the expense of such improvement by local assessment.

"The City Council of Ogden City, situate in Weber county, Territory of Utah, gives notice that it intends to make the following improvements, to-wit:

"Pave and macadamize the following streets: Twenty-fifth street from the west line of Washington avenue to the west line of Wall avenue. This shall be known as paving district No. 2.

"The boundaries of the district to be effected and benefitted are lines running 150 feet back and parallel with the outer line of each side of the streets on each and every block and for the full length thereof therein.

"The estimated cost of such improvement is $40,000.

"For the payment of the cost and expenses thereof the City Council intends to levy local taxes upon the real estate lying and being within said paving district to the extent of the benefits to such property by reason of such improvement.

"The City Council will, on March 29, 1892, hear objections in writing from any and all persons interested in said assessments.

"By order of the City Council.

"T. P. BRYAN,
City Recorder."

On March 29, 1892, at 9:55 o'clock a. m., D. H. Peery and sixty-eight others, claiming to be owners of property abutting upon said improvement filed written objections against the levying of any "local assessment" against or upon their property in the manner and form following:

"The Common Council of Ogden City:

"Gentlemen: We, the undersigned, property owners on Twenty-fifth street, between the west line of Wall avenue and the west line of Washington avenue, and which is designated as paving district No. 2, hereby protest against the levying of any local assessment against or

upon our property for the purpose of paving said street, within said district, and we represent to your honorable body that we are the owners in plat "A," of Ogden City, of the following property, to-wit: (Record pages 145 to 147.)

Name	Frontage of 25th st.	Block
D. H. Peery	Twenty-eighth ft (28)	25
S. C. and W. J. Stephens	Sixty-five ft (65)	24
S. C. Stephens	Twenty-one ft (21)	24
D. M. Stephens	Thirty-five ft (35)	24
W. J. Stephens	Eighty-two ft (82)	24
J. C. Stephens	Twenty ft (20)	19
John Pincock	Twenty-two ft (22)	19
D. H. Stephens	Thirty-two ft (32)	24
Rebecca W. McKee	Seventy-five ft (75)	23
Caleb L. McKee	Twenty-five ft (25)	19
Charles R. Reed	Forty-five and 9 12 ft (45 9-12)	19
R. A. Wells	Forty ft (40)	19
J. H. Spargo	Forty ft (40)	25
John Broom	One hundred and sixty ft (160)	25
Joseph Morley	Thirty ft (30)	25
Lamoni Grix	Twenty-one ft (21)	25
C. F. Kronch	Thirty and 4-12 ft (30 4-12)	24
G. W. Lashus	Fifty ft (50)	20
Mrs. Butterworth and J. M. Major	Fifty-two ft (52)	20
M. Biel	Fifty-two and a half ft (52½)	20
Charles Fuchs	Twenty-five ft (25)	19
Geo. W. Murphy	Twenty-one and a half ft (21½)	25
Geo. W. Murphy	One hundred and seven ft (107)	20
James Thompson	Thirteen and a half ft (13½)	25
James L. Dee	Thirty-one ft 4½ in. (31 4½)	25
Morris Livingston	Nineteen ft (19)	20
J. E. Horrocks	One hundred and twenty-five ft (125)	52
W. Kay	Twenty-two ft (22)	25
Clark, Thompson & Emmet	Twenty five ft (25)	20
Joseph Clark	Forty ft (40)	23
Clark & Patterson	Fifty ft (50)	23
Mrs. H. A. Lewis	Twenty-five ft (25)	23
53d, 76th and 77th Quorum of Seventies, per B. H. Goddard, secretary and treasurer	Forty ft (40)	19
Scudder & Carlson	Twenty-two ft (22)	20
J. H. Cardon	Forty-seven ft (47)	23
J. C. Armstrong	Seventy-nine ft (79)	20

Name	Frontage of 25th st.	Block
C. F. Taylor, by O. E. Hill, agent	Ninety-two ft (92)	24
Emma Munns	Thirty ft (30)	24
John Maguire	Twenty-two and a half ft (22½)	25
Boyle & Patterson	Twenty-five ft (25)	24
H. D. Lewis	Thirty four and a half ft (34½)	24
J. H. Watkins	Twenty one ft (21)	25
E. J Watkins	Twenty ft (20)	25
W. M. Chapman	Forty-one ft (41)	23
Mrs M. E. Fitzgerald	Twenty-five ft (25)	20
C. Sorenson	Seventeen ft (17)	25
John Nicholas, Gomer Nicholas, Jane Nicholas, Rose Nicholas, Leslie Nicholas		
Geo. M. Car, Edministrater	One hundred and thirty-two ft (132)	24
Job Pingree	Twenty-nine and a half ft (29½)	20
Mrs. J. Wagner	Fifty-four ft (54)	19
Mrs. Libbie Wadman	Forty-five and a half ft (45½)	19
A. J. Morrison	Twenty-five ft (25)	20
D. H. Peery, Jr.	Twenty ft (20)	25
Realty Co., by D. H. Peery, Jr., agent	Sixty-two ft (62)	24
E. & H. Madden, by L. R. Rogers, their attorney	Twenty-five ft (25)	23
David Evans, L. R. Rogers & D. H. Peery, Jr.	Sixty-two ft (62)	23
L. P. Burchfield, by D H. Peery, Jr., ag't.	Fifty ft (50)	23

March 28, 1892. Special meeting to hear objections to paving in districts Nos. 1, 2 and 3. (Record page 27.) Council met at 10 o'clock a. m. No quorum being present adjournment was taken until 2 o'clock p. m.

At 2 o'clock p. m., March 29, 1892, council met as per adjournment.

The following members were present at roll call: Councilors Cannon, Calvert, Elliott, McManis and Spencer.

The recorder was instructed to receive any and all documents relating to the paving question, and to note upon the same the time filed, and present to the council, together with the documents now on file, at their next meeting.

Councilor Cannon moved that we postpone further consideration of this question until next Monday morning at 10 o'clock, and that the council to now adjourn until that hour and date.

Special meeting April 4, 1892. Council met at 10 o'clock a. m. as per adjournment. The following members were present at roll call: Councilors Cannon, Dee, Elliott, Graves, Lundy, McManis and Spencer. All protests against levying a local tax in districts Nos. 1, 2 and 3 were read. Councilor Cannon moved that further action be deferred until 3:30 p. m., and that Councilor Elliott be appointed a committee of one to compute by the records the number of front feet protesting against the levying of a tax in the aforementioned districts, and report the result to the council at the adjourned meeting today. Motion carried.

Councilor Elliott moved that Mr. Cannon be appointed a committee of one to consult with the city attorney as to the legality of receiving papers filed since the 29th of March. Motion carried.

On motion of Councilor Graves council adjourned until 3:30 p. m.

Council met at 3:30 p. m.

OGDEN, UTAH, April 4, 1892.

To the Mayor and City Council of Ogden City, Utah.

In the matter of protests referred to me this day against the levying of a local tax for the purpose of paving in districts Nos. 1, 2 and 3, I submit the following report, after having carefully compared said protests with the records, as follows:

(Omitting district No. 1.) District No. 2, total number of feet protesting, 2,315; withdrawals from the same filed March 29, 1892, 432.33 feet; net number of feet protesting, 1,878.66 feet; total number of feet in district, 3,960 feet; number of feet in favor of, 2,081.33; whole number of feet over those protesting, 202.66 feet.

Respectfully submitted,

J. R. ELLIOTT,
Special Committee.

On motion—(going back to record of the council.)—On motion of Councilor Graves the report was accepted and placed on file. On motion of Councilor Cannon, council adjourned at 4:15 p. m.

In time and before the City Council had

acted and passed upon the written objections, and before the Elliott report, withdrawals from the same had been made and filed with the city recorder as follows:

DEFENDANT'S EXHIBIT "B."

To the Honorable Mayor and City Council:

Gentlemen: I hereby request that my name be withdrawn from the remonstrance against paving Twenty-fifth street between Washington and Wall.

Respectfully,

CHARLES FOX.

OGDEN, UTAH, March 31, 1892.

Filed 3—31, '92, 2 p. m.

(Record page 144.)

DEFENDANT'S EXHIBIT "C."

OGDEN, UTAH, April 2, 1891.

Honorable Mayor and members of the City Council:

Gentlemen: Please erase my name from the remonstrance against paving on Twenty-fifth street, between Washington and Wall avenues.

Yours Respectfully,

JOHN MAGUIRE.

Filed 3:15 p. m., April 2, 1892.

(Record page 144.)

DEFENDANT'S EXHIBIT "E."

OGDEN, UTAH, March 29, 1892.

To the Honorable Mayor and City Council of the City of Ogden:

Gentlemen: Having signed a remonstrance against paving Twenty-fifth street through a misunderstanding of the facts in the case as to the costs, etc., we hereby withdraw our remonstrance to said paving.

SCUDDER & CARLSON.

Filed 1:30 p. m., 3—31, '92.

(Record page 144.)

DEFENDANT'S EXHIBIT "J. E. H."

To the Honorable City Council of Ogden City:

After re-considering the matter I hereby withdraw my protest against paving Twenty-fifth street district.

J. E. HORROCKS.

Filed 3—29, 10 a. m.

(Record page 144.)

DEFENDANT'S EXHIBIT "H. A. L."

To City Council, Ogden, Utah:

Will you please see that my name is stricken from the remonstrance that is being circulated opposing the action of the City Council in regard to paving on Twenty-fifth street? I signed the remonstrance without properly understanding its import. I am

in favor of paving. I own property on Twenty-fifth street, and along and in one of the proposed districts. 25 feet.

Very Respectfully,
MRS. H. A. LEWIS.

Filed 3—29.
(Record page 145.)

DEFENDANT'S EXHIBIT "A."

OGDEN, UTAH, April 1, 1892.

To the Honorable Mayor and City Council:

Gentlemen: I hereby request that my name be withdrawn from the remonstrance against paving Twenty-fifth street, between Washington and Wall.

Respectfully,
W. KAY.

Filed 3:25, p. m., April 2, 1892.
(Record page 145.)

DEFENDANT'S EXHIBIT "E. W."

OGDEN CITY, UTAH, March 29, 1892,

To the Honorable Mayor and City Council of Ogden City, Utah Territory.

Gentlemen: We, the undersigned property owners in paving district No. 2, having signed a remonstrance against paving said district, hereby withdraw from said remonstrance our names, and do hereby favor paving the same:

Names.	No. of feet.
C. F. Krouch	30 feet, 4 inches
S. C. and W. J. Stephens	65
S. C. Stephens	21
W. J. Stephens	71
J. C. Stephens	20
D. M. Stephens	35
Mrs. J. Warner	54
G. W. Lashus	50
	346

Filed 3—29, 10 a. m.

(Record page 145.)

PAVING ORDINANCE.

"PLAINTIFF'S EXHIBIT A."

(Record page 8.)

An ordinance creating paving district No. 2 and levying and assessing a special tax on the abutting property in said district to pay the cost of paving therein.

Whereas, The City Council has heretofore ordered to be published in the Standard, a daily newspaper published and printed in Ogden City, for the full period of twenty days the following notice of intention:

"NOTICE OF INTENTION

"Of the City Council of Ogden City of creating a district for paving and of paving and macadamizing the streets therein and to defray the expense of such improvement by local assessment.

"The City Council of Ogden City, situate in Weber county, Territory of Utah, gives notice that it intends to make the following improvements, to-wit:

"Pave and macadamize the following streets: Twenty-fifth street from the west line of Washington avenue to the west line of Wall avenue. This shall be known as paving district No. 2.

"The boundaries of the district to be benefitted and effected are lines running 150 feet back and parallel with the outer line of each side of the streets on each and every block and for the full length thereof therein.

"The estimated cost of such improvement is $40,000.

"For the payment of the cost and expenses thereof the City Council intends to levy local taxes upon the real estate lying and being within said paving district to the extent of the benefits to such property by reason of such improvement.

"The City Council will, on March 29, 1892, at 10 a. m., hear objections in writing from any and all persons interested in said local assessments.

"By order of the City Council.

"T P. BRYAN,
City Recorder."

And whereas the said notice of intention was published daily continuously in said newspaper from March 9 until March 31, 1892, and

Whereas, in said paving district No. 2 there has not been filed written or any objec-

tions to the improvements mentioned, signed by the owners of one-half of the front feet on said Twenty-fifth street from the west line of Washington avenue to the west line of Wall avenue, now, therefore, be it ordained by the City Council of Ogden City as follows:

Section 1. That for the purpose of paving Twenty-fifth street from the west line of Washington avenue to the west line of Wall avenue be, and the same is hereby constituted, a paving district, and the same shall be known as paving district No. 2 of Ogden City.

Sec. 2. That said Twenty-fifth street shall be paved from the west line of Washington avenue to the west line of Wall avenue as follows: With Utah sandstone blocks for ten feet out from the curb on each side of said streets, and the balance of said streets with asphaltum. The said pavement shall be laid and constructed under the supervision of the city engineer and shall be done under contract, to be let to the lowest bidder for such work.

Sec. 3. That the cost of making such improvements of laying said pavements (except the intersections of streets and spaces opposite alleys) within said district shall be assessed upon the lots and lands abutting upon Twenty-fifth street in proportion to the front feet so abutting upon said Twenty-fifth street.

Sec. 4. A special tax of $12 per front foot upon the property abutting on said Twenty-fifth street, from the west line of Washington avenue to the west line of Wall avenue, is hereby levied for the purpose of laying and making said improvement as hereinbefore provided for, and said taxes shall become delinquent, as follows: One-tenth shall be delinquent fifty days after the passage of this ordinance; one-tenth in one year, one-tenth in two years, one-tenth in three years, one-tenth in four years, one-tenth in five years, one-tenth in six years, one-tenth in seven years, one-tenth in eight years and one-tenth in nine years after the passage of this ordinance, and each installment, except the first, shall draw interest at the rate of 7 per cent per annum from and after the passage of this ordinance until the same shall become delinquent, interest at the rate of 10 per cent shall be paid thereon, and such tax shall be enforced as any other cases of special taxes.

Sec. 5. That the Ogden City Street Railway company, a corporation heretofore created and now operating an electric street railway in said paving district on said Twenty-fifth street, from the west line of Washington avenue to the west line of Wall avenue, be, and it is required and directed to pave all the space be-

tween its different rails and tracks on said Twenty-fifth street, and a space of two feet wide outside of the rails on each side of said track, and also the space between the rails on all side tracks and two feet on the outer side of the rail on each side of the said side tracks at the same time as the paving is done on the other parts of the said street; and the pavement to be laid and made by said street railway company shall be of the same material as the other paving upon said street. That after said pavement is laid said railway company is required and directed to keep that portion of the street which it is herein required to pave in good and proper repair; using for said purpose the same material that the said street is or shall be paved with, and shall keep the said pavement level with the top rails of the track of its railway.

Sec. 6 That the Ogden Electric Street Railway company known as the Brinker-Henderson company, a corporation heretofore created and now having a street railway track in said paving district, on said Twenty-fifth street, from the west line of Washington avenue to the west line of Wall avenue, be, and it is required and directed to pave all the space between its rails and tracks on said Twenty-fifth street and a space of two feet wide outside

of the rail on each side of the said track, and also the space between the rails on all side tracks, and two feet on the outside of the rails on each side of the said side tracks, of Utah sandstone, of the same kind and quality as that used by the city, at the same time that the paving is done on the other parts of the said street. That after the pavement is laid, said railway companies are required and directed to keep that part of the street which it is required to pave in good and proper repair, using for said purpose the same material that the said street is or shall be paved with, and shall keep the said pavement level with the tops of the rails of the tracks of its railway.

Sec. 7. That George W. Jones, A. J. Warner, A. I. Stone, John Maguire and John H. Restall, members of the council be, and they are hereby, appointed a board of equalization and review of the taxes levied under this ordinance, and upon the completion of the list or lists of the property in said paving district No. 2, to be taxed, the said list or lists shall be placed in the hands of said board, and the said board shall give public notice of the completion of said lists, and shall appoint not less than five consecutive days upon which they will meet during the usual business hours, stating in said notice the place of its meetings,

and during the time specified shall keep the list or lists open to public inspection, and any person or persons feeling themselves aggrieved shall have a hearing before said board, and the said board are hereby granted power and authority to make correction of any tax deemed by them unequal and unjust.

Passed March 22, 1893.

Approved March 25, 1893.

The above ordinance was published for the full time required by law in the Daily Standard, a daily paper published in Ogden City, Utah. (Record page 143.)

COLLECTION OF THE TAX.

The city was on December 30, 1893, collecting the first installment of the tax which the plaintiff in the supplemental complaint paid under protest as follows:

PROTEST.

OGDEN CITY, December 30, 1893.

C. M. Brough, Treasurer of Ogden City:

Notice is hereby given that the undersigned pays the special tax or assessment levied upon his property in paving district No. 2, in said Ogden City, under protest, and intends to sue to recover the money back so paid.

That the grievance and grounds thereof and of this protest are:

First. That on or before March 29, 1892, petitions were filed with the city recorder of said city, signed by property owners in said district, protesting against the levying of any local assessment or tax against or upon their property for the purpose of paving Twenty-fifth street, in said district and city; that the whole number of front feet owned by those persons so protesting with frontage on Twenty-fifth street, in said district, is, and was, about 3,000 feet, which is, and was, more than one-half of the whole frontage on said Twenty-fifth street, within said district, liable for assessment or taxes.

Second. That in letting the contract for said paving said Ogden City limited bidders to bona fide residents of Ogden City, and would not permit general competition for the doing of said paving.

Third. That the notice of intention to create said paving district given by said city was illegal and void in this, that it is, and was, uncertain and indefinite, in that it does not state whether it is, or was, the intention to pave or macadamize said district, and if to pave, the kind of material to be used. That the whole of the lands to be affected by said local assessment is, and was, not sufficiently described. That it provided for the hearing

only of written objections. That the cost of the work could not be properly estimated without designating the kind of material to be used.

Fourth. That said tax or assessment is void and illegal in this: That at the time of creating said paving district or afterwards, there was no provision made for any special fund out of which said pavement should be paid for.

(Signed)

L. R. Rogers,

W. C. Warren,

J. C. Armstrong,

J. H. Spargo,

H. L. Griffin,

Joseph Clark,

Clark, Emmet & Thompson,

Patterson & Clark,

John Nichols Estate, By Geo. M. Carr, edministrater.

John Nichols, by Geo. M. Carr, his agent and attorney in fact.

S. C. Chapman, for the estate of William Chapman, deceased.

William Driver, by G. W. Driver, attorin fact.

G. W. Lashus,

W. H. Stephens,

J. E. and Ann Horrocks,
W. Kay,
John Pincock,
M. Biel,
C. F. Taylor, by J. C. Armstrong.
Job Pingree, by James Pingree, attorney in fact.

Mr. Rogers: Another protest, No. 2.

Provo, Utah, December 8, 1895.

Willis T. Beardsley, Esq., City Auditor, Ogden City, Utah.

Dear Sir: I hereby enter my protest against the payment of the paving tax against the property owned by the Realty company on Twenty-fifth street, Ogden, Utah, and in paying said taxes, I pay it under protest.

Realty Company of Kittery, Maine. By D. H. Peery, Jr., agent.

Protest No. 3.

Provo, Utah, December 8, 1895.

Willis T. Beardsley, Esq., City Auditor, Ogden City, Utah.

Dear Sir: I hereby enter my protest against the payment of paving tax assessed against my property on Twenty-fifth street, Ogden, Utah, and in paying said tax, I pay it under protest.

D. H. Peery, Jr.

The lower Court found for the plaintiffs; made the injunction perpetual and gave each of the plaintiffs in the supplemental complaint a judgment against the city for the amount of the first installment of the tax paid by him under such protest. An appeal was taken to the Territorial Supreme Court and the judgment of the lower Court was affirmed. This appeal is taken from the decision of the Territorial Supreme Court.

ASSIGNMENTS OF ERROR.

First. The Supreme Court of Utah erred in affirming the judgment of the District Court in this:

Because it apppears from the face of the complaint and the supplemental complaint, that the proceedings sought to be enjoined do not cast a cloud upon the title of plaintiffs, and do not entitle plaintiffs to any relief either equitable or legal.

Second. Said Court further erred in affirming said judgment in this:

That the facts found do not entitle plaintiffs to a decree for any relief whatever.

Third: Said Supreme Court further erred in affirming the judgment of the Court below awarding to the plaintiffs individually judg-

ment for the amount of taxes paid, for the reason that said plaintiffs had a legal remedy for the recovery of said taxes under the statute, which remedy was and is exclusive, and for the further reason that said payments were voluntary payments.

Fourth. That the Court erred in rendering judgment in favor of the plaintiffs, and against the defendant.

Fifth. The Court erred in failing to find upon the issue of estoppel raised by the defendants' amended answer to the supplemental case in this: That the plaintiffs named in the supplemental complaint had full knowledge before and at the time that the said pavement was being constructed, and that the said assessment complained of was being and had been made, and that the contract complained of was being and had been let, and that the city, defendant herein, was about to and was expending large amounts of money in constructing said pavement in said district, and that they, having such knowledge, took no legal steps to stop the said work, or to question the proceedings of the city council until this supplemental complaint was filed in this Court, several months after the work had been accepted by the City Council as being complete, and after the said city had fully paid for the said work,

having thus stood by and in silence as to the levy of said assessment, the construction of said work, and the acceptance of the same, and the city having fully paid for it, the defendants were thus estopped to complain.

Sixth. The Court erred in holding that the plaintiffs had and have no plain, complete and adequate remedy at law, because section 1, chapter 41, of the Laws of the Twenty-ninth Legislatives Asembly of Utah, approved March 13, 1890, provides how and when such payment shall be made, and how and when action may be brought to recover the same, if found to be illegal, inequitable and unjust.

Seventh. The Court erred in holding that the owners of one-half of the frontage in feet on Twenty-fifth street, and within said district, filed objections to making the improvement complained of, or in fact to any improvement or at all, for the reason that the evidence plainly shows that no objections to such improvements were ever filed with the recorder on or before 10 a. m., March 29, 1892, as provided in the notice of intention to improve and pave said street and in accordance with law, or at all.

Eighth. The Court erred in failing to find upon the issue raised by the defendant's answer, that the cause of action of plaintiffs, and

each and every cause of action of each and every one of the plaintiffs in the supplemental complaint for the recovery of taxes paid under the so-called protest, is barred by the provisions of section 1, chapter 41, of the laws passed by the Twenty-ninth session of the Legislative Assembly of the Territory of Utah, approved March 13, 1890.

Ninth. The Court erred in holding that the defendant, Ogden City, in pursuance of an ordinance passed March 22, 1893, were about to expose the real estate described in the supplemental complaint for sale to satisfy an illegal assessment imposed by the said ordinance, and that the parties plaintiffs in this action, after said property had been advertised for sale and was about to be sold to satisfy the said illegal assessment then due, paid, under protest, to said Ogden City, the following amounts, to-witness:

J. C. Armstrong, $95.04; Mathias Biel, $63; Joseph Clark, $48; Samuel Chapman for the William Chapman estate, $49.20; Joseph Clark for Clark, Emmett & Thompson, $30; William Driver, $60; H. L. Griffin, $23.75; Lamoni Grix, $24.90; Ann Horrocks and James E. Horrocks, $124.80; George W. Lashus, $60; H. D. & J. S. Lewis, $82.08; Carrie Lewis, $30; Joseph Morley, $36; Patrick Healy, for Patterson &

Healy, $30; Joseph Clark for Patterson & Clark, $60; L. R. Rogers, $74.04; J. H. Spargo, $48; D. M. Stephens, $14.70; Carl Sorenson, $20.40; W. C. Warren, $48; Geo. M. Kerr, guardian for Nichols heirs, $160.08; D. H. Peery, Jr., $24; Realty Company of Kittery, Maine, $748.80; Job Pingree, $35.40; Ogden Union Depot and Railway company, a corporation, $118.80; George W. Murphy, $154.20.

BRIEF.

The assignments or error 1 and 2 briefly charges that there is no "equity on the bill."

As has been stated, this is an action brought to restrain the collection of and to annul an alleged illegal assessment made by the corporation of Ogden City, which, if legal, is a lien upon plaintiffs' real estate, but the complaint, original and supplemental, do not show that the invalidity of the assessment does not appear in the proceedings of the City Council levying the tax. The failure to make this allegation, we claim, is fatal.

The allegations of the complaint do not bring this case within any of the recognized exceptions to the rule that equity will not grant relief in this class of cases by way of injunction to restrain the collection of a tax. These exceptions are:

1. To prevent a multiplicity of suits.
2. To prevent irreparable injury.
3. To remove a cloud from the title.

The question is, whether the case is within either of these exceptions. If the record by which the tax is levied is void upon its face, then the plaintiffs have a plain remedy at common law. If the record does not show the invalidity of the tax, that fact must be clearly alleged in the complaint; because, if that is not the case, no cloud would be cast upon the title, and no extrinsic evidence, or evidence *de hors*, of the record could be introduced. A failure to make this allegation is fatal.

Heywood v. Buffalo, 14 N. Y., 534.

Guest v. City of Brooklyn, 69 N. Y., 506; page of opinion, 513.

Ewing v. East St. Louis, 5 Wall (U. S.) 413.

Dillon on Municipal Corp., 4th edition, section 611 and cases there cited.

Dows v. City of Chicago, 11 Wallace (U. S.) 109.

The fact that the assessment is divided into ten installments does not bring the case within the first exception. A decision upon one installment would be effective upon all.

Guest v. City of Brooklyn, supra, 513.

The plaintiffs nowhere allege "irreparable injury to the freehold," or to anything or anyone, and if the taxes, on the face of the proceedings, are illegal and void, as alleged, no irreparable injury can follow from the sale of the property.

Dows v. City of Chicago, 11 Wallace 112.

Plaintiffs nowhere allege that the collection of the tax will "engender a multiplicity of suits," nor do they anywhere allege that the collection of the tax will "work irreparable injury." The nearest they come to making any allegations of this kind is found on page 6, folio 15 of record in the original complaint in these words:

"Unless defendants are restrained, they will enter into a contract for doing the work (paving) which, if illegal and void, will engender a multiplicity of suits upon Ogden City and upon the plaintiffs and all others similarly situated.

"That great and irreparable injury will result to these plaintiffs and all other similarly situated if said assessments are made and said contracts for paving entered into by said defendants."

Appellant do not mention "multiplicity of suits" nor "irreparable injury" in the supplemental complaint, but simply adopt and make the original complaint a part of the supple-

mental complaint, and, of course, adopt simply the meaning and words there used.

There the action was to prevent and assessment and the making of a contract. Here and now the object of the action is to set aside the assessment and restrain the collection of a tax.

What can such allegations have to do with the effect of collecting this tax?

Not having alleged that to collect the tax would engender "a multiplicity of suits" or "work irreparable injury to the freehold," and having failed to allege that the record by which the tax was levied, made by the city, *upon its face* fails to show the invalidity or illegality of the tax, plaintiffs have no standing in equity and cannot maintain this action to enjoin the collection of the tax, because to sell the property under the allegations made by plaintiffs in this case in their complaint and supplemental complaint could cast no cloud upon plaintiffs' titles or any of them.

FINDINGS DO NOT SUPPORT THE JUDGMENT.

Under error No. 2 herein assigned we make the further point that the judgment in this case is not supported by the findings. The lower court made findings as follows: (Record pages 185, 186, 187 and 188.)

6. That on March 29, 1892, at 9:55 o'clock a. m., D. H. Peery and sixty-eight others, including all the plaintiffs in this action and in the supplemental complaint who were then the owners of real property within the said paving district No. 2, and with frontage on Twenty-fifth street within said paving district, *filed* a protest with the said recorder of said Ogden City, protesting against the levying of any local assessment against or upon their property for the purpose of paving said street within said district. *That said persons so protesting owned and protested for more than one-half of the whole frontage on said Twenty-fifth street within said district, to-wit: 2,414 feet* That after said hour of 10 o'clock a. m., of said day certain persons who had protested to the amount of 302¼ feet, withdrew their protests, leaving at all times 2,111¾ feet frontage on said Twenty-fifth street, in said district, still protesting against the said local assessment. That the total number of feet fronting on said Twenty-fifth street, in said paving district, as mentioned in said notice of intention, above set forth, was 3.960, of which 660 feet belonged at said time and still belongs to said Ogden City, and was then and is now used for public purposes by the said city; and 125 feet of said frontage was then, and is now, the property of the said Ogden City, and was public school property, used and owned for public schools.

The Supreme Court of Utah Territory in affirming the decision of the lower Court adopted and made such finding its own.

Cannon v. Pratt, 99 U. S. 619 p. opin. 621-622.

The Court finds that "more than one-half of the whole frontage on said Twenty-fifth street within said district, to-wit: 2414 feet" had protested. This is a finding that, upon the face of the record, the City Council had no jurisdiction or authority to pass the ordinance to pave or to make the improvements complained of, and it follows that if this is so appellee had a plain, speedy and adequate remedy at law, because the assessment and levy of the tax could not cast a cloud upon the title.

Dows v. City of Chicago, supra.

REMEDY AT LAW.

Appellant's contention now is that the action by injunction cannot be maintained for the reason that the plaintiffs have a plain, speedy and adequate remedy at law. (Error 7, Record page 203.)

"Where a statutory remedy is given it must be followed, or, in other words, the plaintiffs are concluded by the remedy provided in Section 1, Chapter 41, of Laws of 1890, which reads as follows:

"And no such special tax shall be declared void, nor shall any such assessment or part thereof be set aside in consequence of any error or irregularity committed or appearing in any of the proceedings under this act or the acts of which it is amendatory; but any party feeling

aggrieved by any such special tax or assessment or proceeding may pay the said special tax assessed upon his, her or its property, or such installments thereof as may be due at any time before the same shall become delinquent, under protest and with notice in writing to the city collector that he intends to sue to recover the same, which notice shall particularly state the alleged grievance and grounds thereof, whereupon such party shall have the right to bring a civil action within sixty days thereafter *and not later to recover* so much of the special taxes paid as he shall show to be *illegal, inequitable* and *unjust*, the cost to follow the judgment to be apportioned by the Court, as may seem proper, *which remedy shall be exclusive.*

The city collector shall promptly report all such notices to the City Council for such action as may seem proper. No Court shall entertain any complaint that the party was authorized to make and did not make to the City Council sitting as a board of equalization, nor any complaint not specified in said notice fully enough to advise the city of the exact nature thereof, nor any complaint that does not go to the groundwork, equity and justice of the tax. The burden of proof to show such tax or part thereof invalid, inequitable and unjust shall rest upon the party who brings such suit."

"A Court of equity is not a Court of errors, to review the actions of public officers in the assessment and collection of taxes, and will not revise their decision. The law has provided a particular mode for the settlement and decision of errors in behalf of persons dissatisfied with the tax, and they must avail themselves of the

legal remedy thus prescribed, and will not be allowed to waive such relief and seek in equity to enjoin the collection of the tax."

Warden v. Board of Supervisors, 24 Wis. 672.

Macklot v. City of Davenport, 17 Iowa 385.

People v. Arguello, 37 Cal. 524.

Saving and Loan Society v. Austin, 46 Cal. 488-89-90.

Houghton v. Austin, 47 Cal. 651.

"If the tax, as assessed, is illegal and void, as insisted by the plaintiff, he had an ample remedy at law—could have paid the tax under protest and recovered it back by a suit at law against the city."

C. P. R. R. Co. v. Corcoran, 48 Cal., pp. 69 and 70.

Dill on Municipal Corp., sec 906 and note.

"If there is a remedy by statute by suit at law, either before or after payment, equity will not grant relief."

R. R. Tax Cases, 92 U. S. 555; p. of opinion, 614-15.

Shilton v. Platt, 139 U. S. 591; p. of opinion, 594-5-7.

Snyder v. Marks, 109 U. S. 189; p. of opinion, 193.

Dows v. Chicago, 11 Wall, 110.

COLLATERAL ATTACK.

Under this head "no equity in the bill," (assignments of error 1 and 2) we raise another question which we claim is vital in this case, viz: That when the City Council has obtained jurisdiction of the subject matter by giving notice to pave as was done in this case, and are thus empowered to pass upon the facts essential and sufficient to dislodge it of the jurisdiction already acquired by giving notice, its decision is *conclusive* against a collateral attack by way of injunction, as is attempted in this case.

The law giving the City Council this power is Section 13 Chapter 41 of the Laws of the Twenty-ninth Session of the Legislative Assembly of the Territory of Utah, 1890, and is as follows:

"In all cases before the leuy of any taxes for any improvements provided for in this act the City Council shall give notice of intention to levy said taxes naming the purposes for which the taxes are to be levied, which notice shall be published at least twenty days in a newspaper published within said city. Such notice shall describe the improvements so proposed, the boundaries of the district to be effected or benefitted by such improvement; the estimated cost of such improvement and desiginate the time set for such hearing. If at or before the

time so fixed, written objections to such improvement signed by the owners of one-half of the front feet abutting upon that portion of the street, lane, avenue, or alley to be so improved, be not filed with the recorder, the council shall be deemed to have acquired jurisdiction to order the making of such improvement."

In passing upon this question, it is first necessary to decide what constitutes jurisdiction, and in making this decision it is necessary to keep in mind the fact that the mode of procedure prescribed by the statutes of this territory is different than that of nearly every other state or jurisdiction known to the books.

Chapter 41, laws of 1890, under which this assessment was made, gives the City Council power to put its hand to the machinery and set it in motion. Thus, it will be seen that the law gives the City Council jurisdiction to make the assessment and it need not go to the people and ask them to delegate that power. The only prerequisite to giving the City Council full jurisdiction is that such council shall publish a notice of intention as prescribed by law fixing a time when it will hear objections to making the improvement, signed by the owners of one-half of the front feet abutting upon that portion of the street to be improved. In other words, by the publication

of the notice of intention for the required time, gives the City Council absolute jurisdiction to make the improvement, and the only way that the jurisdiction can be dislodged, is that the owners of one-half of the frontage in feet abutting upon that portion of the street to be improved shall have filed their objections in due form on or before the time fixed in the notice with the city recorder. That is to say, that if such objections be not filed with the recorder the City Council shall be deemed to have acquired jurisdiction; that is, they acquired jurisdiction by publishing the notice of intention, but it can be taken away by the objection of the owners of one-half of the frontage.

That the City Council before taking any steps to make this assessment, published the requisite notice of intention to pave, is not questioned. Indeed, the sufficiency of this notice was passed upon favorably when this case was formally before the Utah Supreme Court. (See Armstrong vs. Ogden City, 9 Utah page 275), and that said notice was published for the full twenty days as required by the statute, is fully shown by the proof of publication of such notice to have been over twenty-one days; in fact, in a daily newspaper published in the City of Ogden, viz: The Standard.

It only remains now to determine whether or not the City Council was dislodged of its jurisdiction thus acquired by the objection of the owners of one-half of the frontage in feet abutting upon the street to be paved, by having filed such objections in proper form and in time, with the city recorder, as the law requires.

Appellants contention is that the council having acquired jurisdiction by publication of the notice of intention according to law, it thus became a tribunal of orignal jurisdiction to decide and pass upon the question of whether or not the owners of one-half of the frontage in feet abutting upon that portion of the street to be improved, had, in fact, filed objections with the city recorder, as required by law, and that such decision and judgment is conclusive when collaterally attacked in this way. It would not be conclusive in action by certiaori to set aside the assessment nor in action by ejectment to try title to the premises under tax deed, but it is conclusive as against an action by injunction to prevent the collection of the tax.

In commenting upon this subject, Elliott, on Roads and Streets, page 218 and 219, says:

"In almost all of the states the original proceedings are had before local tribunals, as

boards of supervisors, boards of commissioners, county judges and common councils, but whatever may be the title or the tribunal upon which the authority to direct the opening of streets and roads is conferred, its authority is, in such matters, of a judicial nature. These tribunals are not always, in the strictest sense of the term, courts, but when acting in the matter of opening streets and roads they are engaged in the exercise of judicial functions. Boards of county commissioners and boards of supervisors are, when engaged in hearing controversies respecting the opening of roads and streets, regarded as courts of statutory jurisdiction. Such boards possess power of a judicial nature and also administrative and ministerial powers, but in hearing highway cases they exercise judicial functions.

"It is essential to the validity of these proceedings that the tribunal before which they are prosecuted should have jurisdiction, both of the subject matter and of the persons of those whose lands are sought to be appropriated. There is some diversity of opinion, but the weight of authority is that the jurisdiction must appear on the face of the record, and there are some cases that go so far as to hold that the presumption is against jurisdiction unless the face of the record discloses facts which confers jurisdiction. It is, however, generally agreed that if the record affirmatively shows jurisdiction, then the same presumptions will be indulged in favor of the proceedings as are indulged in favor of proceedings in courts of general jurisdiction. The judgment of an inferior court upon jurisdic-

tional facts is generally regarded as conclusive, and where there is a judgment necessarily affirming that jurisdiction exists and this judgment could not have been pronounced without passing upon jurisdictional facts, it will be conclusive as against all collateral attacks. It is not necessary that there should be a formal judgment expressly affirming that jurisdiction exists, nor is it necessary that there should be an express finding of jurisdictional facts, for it is enough if the judgment impliedly asserts the existence of jurisdiction."

It must be remembered that jurisdiction appears upon the face of this record and that the city council decided in a judicial way that it had jurisdiction. It did this by passing upon and deciding that objections filed with the city recorder, if, in fact, any objections ever were filed, were not sufficient to legally prevent the council from making the assessment complained of and by passing the ordinance levying the assessment. This must be so, for to hold otherwise would be to admit that the record upon its face shows that the City Council did not have jurisdiction, and in such case the complaint herein would have to be dismissed for want of equity, for no court would hold that a title which would result from a sale to recover these delinquent taxes, which is based upon a record showing no jurisdiction to levy the tax, would even cast a cloud upon

plaintiffs' title, and in such case plaintiffs would have a plain, speedy and adequate remedy at law. It must be true that under the provisions of section 13, chapter 41, of the laws of 1869, that the City Council is empowered to make such decisions, for if not, what tribunal is to decide? We claim that the City Council has this power. It may be true, and doubtless is true, that if the action of the City Council was attacked for fraud or mistake, such fraud or mistake could be shown in a collateral proceeding like this. Our claim is that no fraud or mistake being alleged in the complaint, the judgment of the City Council is a judicial one and cannot be reviewed except in a direct proceeding, that is by *certiorari* to correct the record.

"If the preliminary facts are sufficient to authorize the tribunal to proceed in the matter there is jurisdiction, and, although subsequent errors and irregularities may intervene, the proceedings will be valid unless avoided by appeal or certiorari."

Elliott on Roads and Streets, p.p. 224-243.

"Where, however, there is a petition not plainly insufficient upon its face, but sufficient in form and substance to require a judgment upon its sufficiency, the judgment, whether formally expressed or not, will uphold the proceedings as against a collateral attack made after the work has been completed."

Elliott on Roads and Streets, p. 383.

"In all cases where there is a permanent tribunal to approve or reject a report, there is a tribunal competent to render a judgment strong enough to resist collateral attack."

Van Fleet on Coll. Attack, Sec. 63.

Elliott on Roads and Streets, p. 259.

Beach on Public Corporations, Sec. 1130.

"A common council is such a tribunal."

Van Fleet on Coll. Attack, Sec. 801.

Town of Colma vs. Eaves, 92 U. S. 484.

Commissioners vs. Aspinwall, 21 Howard, 539; page of opinion, 544.

Bissell vs. City of Jeffersonville, 24 Howard, 287; page of opinion, 296 to 299.

"No error of fact makes the judgment void."

Van Fleet on Coll. Attack, Sec. 526 and Notes.

The plaintiffs have had one trial in this matter before the City Council; they were summoned into court by virtue of a notice of intention and submitted the controversy to the judicial decision of the City Council, and now they are asking another trial in this Court by making a collateral assault upon that decision, and that this is a collateral assault; see:

Montgomery vs. Wassam, 15 N. E. Rep., p. 795.

Montgomery vs. Wassam, 19 N. E. Rep., p. 184.

Van Fleet on Coll. Attack, Secs. 3 and 4.

"Acts of the council in deciding the sufficiency of the protest is a judicial one."

Elliott on Roads and Streets, pp. 218 and 219.

"The record need not show a formal judgment. If the preliminary facts are sufficient to authorize the tribunal to proceed, then there is jurisdiction. The proceedings will be valid until avoided by appeal or certiorari."

Elliott on Roads and Streets, p. 224.

The District Court did not find on all the material issues raised by the answer of the city, viz: the following: (Record page, 23 and 24.)

The Court erred in failing to find upon the issue of estoppel raised by the defendants' amended answer to the supplemental complaint in this: That the plaintiffs named in the supplemental complaint had full knowledge before and at the time that the said pavement was being constructed and that the said assessment complained of was being and had been made and that the contract complained of was being and had been let and that the city, defendant herein, was about to and was expending large amounts of money in constructing said pavement in said district, and that they, having such knowledge, took no legal steps to stop the said work or to question

the proceedings of the City Council until this supplemental complaint was filed in this Court, several months after the work had been accepted by the City Council as being complete, and after the said city had fully paid for the said work, having thus stood by and in silence as to the levy of said assessment, the construction of said work and the acceptance of the same, and the city having fully paid for it, the defendants are estopped to complain.

The Court erred in failing to find upon the issue raised by defendants' answer that the cause of action of the plaintiffs and each and every cause of action of each and every one of said plaintiffs in the supplemental complaint for the recovery of taxes paid under the so-called protest is barred by the provisions of Section 1, Chapter 41, of the laws passed by the twenty-ninth session of the Legislative Assembly of the Territory of Utah, approved March 13, 1890. (Assignment 10 a. Record page 177.)

A bare inspection of the answer and findings adopted by the Territorial Supreme Court, will show this. This failure was error for which the judgment should have been reversed.

The statutes of the United States, Chapter 80, Page 12, Volume 1, Supplement to the Revised Statutes of the United States, requires the Territorial Courts to proceed in accordance with the Territorial Code of Civil Procedure, in all cases both in law and in equity.

The Code of Civil Procedure of Utah by Sections 504 and 505, which read as follows, require findings of fact in writing, and it must appear affirmatively that findings were made and that they support the judgment:

"Sec. 504. Upon a trial of a question of fact by the Court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision."

"Sec. 505. In giving the decision, the facts found and the conclusions of law must be separately stated. Judgment upon the findings must be entered accordingly."

U. P. R. R. Co. vs. Reynold, 50 Cal., 93.

Under this system a finding is required on every material issue.

U. P. R. R. Co. vs. Reynolds, supra.

Campbell vs. Bochman, 49 Cal., 367.

Dows vs. Clark, 51 Cal., 263.

Watson vs. Cornell, 52 Cal., 91.

O'Connor vs. Frasher, 53 Cal., 435.

While it is true that under this system, the appellate Court will presume, if no findings appear in the record, that they were waived in the Court below, this presumption does not obtain when findings on some of the issues appear in the record.

People vs. Fuqua, 61 Cal., 377.

In this case the Court says: "It has been repeatedly held by this Court that the failure of the trial Court to find upon all the issues raised by the pleadings was a sufficient ground for the reversal of the judgment. It has never been suggested in such case that the failure to find upon all the issues would raise a presumption that those not found upon had been abandoned on the trial."

Our contention in the matter of the estoppel is that all the plaintiffs in the supplemental complaint are estopped because they have stood by, well knowing that the City Council had levied the assessment complained of; that the city was making the improvement, and did not bring action to restrain the council or the city from doing the work until the work was completed and the contractors paid for doing the same, in full.

Dillon Municipal Corp., Sec. 924 and notes.

Elliot Roads and Streets, p. 384.

Montgomery v. Wasson, 19 N. E. Rep., 184.

Montgomery v. Wasson 15 N. E. Rep., 797.

Sanborn v. Manistee, 53 N. W. Rep., 161.

Richy v. Topeka, 16 Pac., 332.

Patterson v. Rainer, 43 Iowa, 477.

The statute under which this assessment is made is an exact copy of the charter of the

city of Omaha upon this subject; in fact, it was copied after that law.

The Supreme Court of Nebraska has just construed this statute in a case where action was brought to enjoin the collection of a tax, and holds as follows:

"Injunction will not lie where the action was not commenced until the work was completed and no offer to tender any portion of the tax was made; even where it is alleged that the assessment is absolutely void."

Redick v. Omaha, 52 N. W. Rep., p. 847.

City of Elkhart v. Wickwire, 22 N. E. Rep., p. 342.

STATUTE OF LIMITATIONS.

The court failed to find upon the issue raised by defendants' answer (Record page 24) that the causes of action in the supplemental complaint, and each of them, are barred by the statute of limitations, and this is assigned as error. (Record page 177.)

(a) The Court erred in failing to find upon the issue raised by defendants' answer that the cause of action of the plaintiffs and each and every cause of action of each and every one of said plaintiffs in the supplemental complaint for the recovery of taxes paid under the so-called protest, is barred by the provisions of section 1, chapter 41, of the laws passed by the twenty-ninth session of the Legislative Assembly of the territory of Utah, approved March 13, 1890.

The first installment of the tax became delinquent fifty days after the passage of the ordinance (Record page 9), or on May 12, 1893. It was paid under what is termed a protest on December 30, 1890 (Record page 113), and suit was brought to recover the amount so paid by the supplemental complaint herein, filed April 9, 1894, (Record page 19), or ninety-nine days after payment.

Appellants' contention is that so far as a money recovery is concerned in this case, the plaintiffs are barred by the provisions of section 1, chapter 41, of the laws of 1890, herein before set out. That section provides, among other things, that:

"Any party feeling aggrieved by any special tax or assessment or proceeding may pay the tax assessed or levied upon his property at any time before the same shall become delinquent, under protest and with notice in writing to the city collector that he intends to sue to recover the same, whereupon the party shall have the right to bring a civil action within sixty days thereafter, and not later, to recover so much of the special tax paid as he shall show to be illegal, inequitable and unjust."

We claim that after the installment of tax became delinquent, plaintiff could not pay under protest, that is, a protest then would not avail plaintiff; but grant that if payment was

made after tax became delinquent, and plaintiff could insist upon that protest, even if in good and legal form, yet none of the plaintiffs brought suit to recover for more than sixty days after payment.

If the Court had found upon this issue, and also that of estoppel, the findings must have been in favor of the defendant, hence failure to find is error.

"Findings of fact must be responsive to all the material issues raised by the pleadings."

Carson v. Thews, 9 Pac Rep., 609.

Hathaway v. Ryan, 51 Cal., 191.

Le Cort v. Oullahan, 52 Cal., 252.

"To limit the time of bringing action to sixty days is not unconstitutional."

Dillon Municipal Corp., Section 67 and note.

"On the ground that legislation concerning municipal corporations is of a peculiar character on account of their being agencies of the government, the Court of appeals of Kentucky holds that a charter provision limiting the right to bring actions to recover money improperly paid for taxes to six months when the general statutes of limitations allow five years in such cases, was no unconstitutional for granting a special privilege."

Covington v. Hoadley, 83 Ky., 444.

Statute applies to suits in equity as well as in law. (Of course this is elementary.)

Chemical Bank v. Kissimee, 32 Fed. Rep., 429.

Fogg v. Price, 14 N. E. Rep., 741.

Dist. Twp. of Spencer v. Dist. Twp. of Riverton, 62 Iowa, 30.

NO SUFFICIENT PROTEST FILED

We contend that no such written objections were filed with the city recorder in this case. The objections filed were in words and figures following. (Record page 7.)

> To the Common Council of Ogden City.
>
> "Gentlemen:—We, the undersigned property owners on Twenty-fifth street, between the west line of Wall avenue and the west line of Washington avenue to Wall, designated as paving district No. 2, hereby protest against the levying of any local assessment against or upon our property for the purpose of paving said street within said district, and we represent to your honorable body that we are the owners in plat "A" of Ogden City of the following property, to-wit:"

This notice does not protest or purport to protest against the designated *improvement*, but only protests against the making and levying of the local assessment for the improvement. In other words, the parties protesting have no

objection to the improvement, but simply to the local assessment; while the statute itself requires that the protest should be to the *improvement itself*.

We further contend that no written objections were filed to the improvement sufficient in number under any aspect of the case. Undoubtedly the City Council had the power to determine whether the requisite number of feet had protested to defeat the jurisdiction.

(Laws of 1890, Appendix Sec. 13.)

The City Council determined that matter on April 4, 1892, and determined that 202½ feet less than the whole number required by the statute to defeat the jurisdiction had protested. (Record pp. 124 and 1437.)

In determining this matter the City Council was acting in a proceeding duly inaugurated and acting judicially, and such action cannot be reviewed in an equitable action to restrain the collection of the tax, but should be reviewed, if at all, by certiorari, in which action the whole record would be removed to the District Court.

The statute of this territory, unlike most statutes on the same subject, does not require a petition of the majority or any number of owners of property to petition to have the im-

provement made, but confers the jurisdiction in the City Council to make the improvement, unless the owners of one-half of the feet abutting upon the improvement protest against it. There was a total of 3,960 feet abutting upon the proposed improvement and street; the total number of feet that protested was 2,315; from that number 436½ feet withdrew, leaving only 1,878½ feet with protests on file on the day required by the notice. These withdrawals having been made before the final hearing and determination by the council, even if we conceded the protest itself to be sufficient as being made against the improvement, left the City Council free to act.

Irwin v. Mobile, 57 Ala., p. 6.

It was contended by appellants, or was in the court below, tnat what is known as the city hall property, and what is known as the school trustees' property, consisting in the one case of 660 feet, and in the other case of 125 feet, should not be counted in the number of feet in the paving district.

It appears from the record, pages 174 and 175, that these properties were included within the district and neither of them protested. We cannot imagine upon what principle they should be excluded from the number of feet in

the district, nor why they should not be counted in determining the number of feet protesting. It is true that the city hall property was not subject to the tax, being property owned by Ogden City corporation, and that the cost of paving in front thereof must be borne out of the general fund. (See laws of 1890, page 57). But these facts did not and could not in our judgment prevent its being counted in favor of the improvement in its front, as it was controlled by the City Council.

VOLUNTARY PAYMENT.

The Supreme Court of Utah erred in rendering judgment awarding the plaintiffs individually, judgment for the assessment of taxes paid (error three, this brief) because the payments were voluntary. This question is raised in defendants answer. (Record page 22). We also claim that the said Court erred in not finding upon this issue of voluntary payment.

1. The payments were not made before same became delinquent. (Laws of 1890, page 58.) The statute is in these words:

> "But any party feeling aggrieved by any such special tax may pay same or any installment thereof as may be due, *at any time before the same shall become delinquent under protest*, and with notice to the city collector that he intends to sue to recover the same."

Two things are absolutely necessary—[a] the payment must be made under protest before delinquency—[b] the protest must be in writing and must particularly state that the party "*intends to bring suit to recover the amount so paid.*"

The first installment which was paid under the so-called protest became delinquent May 12, 1893. (Record page 9). Payment was made under the protest December 30, 1893. (Record page 113).

A voluntary payment of tax illegally assessed can not be recovered back, even if void, and it makes no difference that the payment is made simply to prevent a levy on the land.

Dewill v. Mortaon, 34 Mich., 170.

Curtis v. Saginaw, 35 Mich., 508.

Rogers v. Greenbush, 4 Am. Rep., 292.

R. R. Co. v. Commissioner, 98 U. S., 541; pages of opinion, 544-5.

We contend that the judgment should be reversed.

R. H. Whipple,
T. D. Johnson,
Attorneys for Appellants.

James N. Kimball,
Of Counsel.

APPENDIX.

CHAPTER XLI., LAWS 1890, UTAH.

MUNICIPAL CHARTERS.

AN ACT supplementing and amending the charters, and defining, prescribing and regulating the powers, duties and government of cities of the first and second class.

SECTION 1. *Be it enacted by the Governor and Legislative Assembly of the Territory of Utah:* That the city council of each city of the first and second class in the Territory of Utah, shall have the following powers: To lay out, establish, open, alter, extend, widen and improve streets, alleys, avenues, sidewalks, parks and public grounds and vacate the same; and to grade, curb and gutter, park and beautify or otherwise improve and keep in good repair, or cause the same to be done in any manner they may deem proper, any park, street, avenue or alley within the limits of the city, and may grade partially or to the established grade, or park or otherwise improve any part of such street, avenue or alley, and may also construct and repair, or cause and compel the construction and repair of sidewalks in such city, of such material, and in such manner as they may deem proper and necessary; and to defray or cause to be defrayed the cost and expense of such improvements or any of them;

the council of such city shall have power and authority to levy and collect special taxes and assessments upon the blocks, lots or parts thereof, and pieces of ground adjacent to or abutting upon the street, avenue, alley or sidewalk thus in whole or in part opened, widened, curbed and guttered, graded, parked, extended, constructed or otherwise improved or repaired, or which may be especially benefitted by any of said improvements; provided that the above provisions shall not apply to ordinary repairs of streets or alleys and one-half of the expense of bringing streets, avenues, alleys or parts thereof to the established grade shall be paid out of the general fund of the city; and such council shall have power to pave, repave or macadamize any street or alley or part thereof in the city, and for that purpose to create suitable paving districts, which shall be consecutively numbered, such work to be done under contract, and under the superintendence of the board of public works of the city.

The cost of paving, macadamizing or repaving of the streets and alleys within any paving district, except the intersection of streets and space opposite alleys within such district, shall be assessed upon the lots and lands abutting upon the streets and alleys in such district, in proportion to the square feet or feet front or both so abutting upon such streets and alleys. The assessments of special taxes for paving purposes herein provided for, shall be made as follows:

The total costs of the improvements shall be levied at one time upon the property and become delinquent as herein provided:

One-tenth (1-10) of the total amount shall be delinquent in fifty days after such levy, one-tenth (1-10) in one year, one-tenth (1-10) in two years, one-tenth (1-10) in three years, one-tenth (1-10) in four years, one-tenth (1-10) in five years, one-tenth (1-10) in six years, one-tenth (1-10) in seven years, one-tenth (1-10) in eight years, and one-tenth (1-10) in nine years; each of said installments, except the first, shall draw interest at the rate of seven per cent. per annum from the time of levy aforesaid, until the same shall become delinquent, and after the same shall become delinquent, interest at the rate of 10 per cent. per annum shall be paid thereon. Such taxes shall be collected and enforced as in other cases of special taxes. In cases of omission, errors or mistakes in making such assessment or levy in respect of the total cost of the improvements, or deficiencies or otherwise, it shall be competent for the council to make a supplemental assessment and levy to supply such deficiencies and omissions, errors or mistakes. The cost of paving, macadamizing or repaving the intersection of streets and space opposite alleys in any paving district, shall be paid by the city as hereinafter provided; but nothing herein contained shall be construed to exempt any street railway company from keeping every portion of every street, avenue and alley used by it, upon or across which its tracks shall be constructed at or near the grade of such streets in good and safe condition for public travel, and skall keep the same plank, paved, macadamized or otherwise in such condition for public travel as the city council of such city may

from time to time direct, keeping the plank-pavement or other surface of the street or alley level with the top of the rails of the track of such street railway. The portions of the streets or alleys to be so kept and maintained by all such street railway companies shall include all the space between its different rails and tracks, and also a space outside of the outside rail of each outside track of at least two feet in width, and the tracks herein referred to shall include not only the main tracks, but also all side tracks, crossings and turnouts, constructed for the use of such street railways.

If any company shall have laid tracks upon the streets or highways of any city and failed to operate them with cars for public use for the period of nine months after the laying thereof, tuch tracks may be declared a nuisance and taken up by the city and removed.

For the purpose of paying the cost of paving, macadamizing or repaving the streets and alleys in any paving district exclusive of the intersections of streets and space opposite alveys therein, the council shall have power, and may by ordinance cause to be issued bonds of the city, to be called "District Paving Bonds of District No. ———," payable in not exceeding ten years from date, and to bear interest payable annually, not exceeding the rate of 6 per cent. per annum, with interest coupons attached, and in such case shall also provide that said special taxes and assessments shall constitute a sinking fund for the payment of said bonds and interest, and said bonds shall not be sold for less than their par value, pro-

vided that the entire cost of paving, repaving or macadamizing any such streets, avenues or or alleys, properly chargeable to any blocks, lots of lands or part thereof within any such paving district according to the front feet or square feet thereof may be paid by the owner of such lots or lands within fifty days from the levy of such special taxes and thereupon such lots or lands shall be exempt from any lien or charge therefor.

Whenever the council deem it expedient, they shall have power, for the purpose of paying the cost of paving, repaving or macadamizing the intersection of streets and spaces opposite alleys in the city, to issue bonds of the city, to run not more than twenty years, and to bear interest payable semi-annually at a rate not exceeding six per cent. per annum, with coupons attached, to be called "paving bonds," and which shall not be sold for less than their par value, and the proceeds of which shall be used for no other purpose than paying the cost of paving, repaving or macadamizing the intersections of streets and alleys in the city. *Provided*, That the aggregate amount of such bonds issued in any one year shall not exceed the sum of one hundred thousand dollars ($100,000); and if in any such city there shall be any real estate not subject to assessment of special taxes for paving purposes, the council shall have the power to pave in front of the same and to pay the cost thereof that would otherwise be chargeable on such real estate, in the same manner as herein provided for the paving of intersection of streets and paying therefor. The word "lot" as in this

act used shall be taken to mean any subdivided real estate. The word "lands" shall mean any unsubdivided real estate. The word "street" shall be deemed to include boulevard and avenue.

Provided, That if the lots and real estate abutting upon that part of the street ordered, repaved or macadamized as shown upon any such recorded plat or map are not of uniform depth, or if for any other reason it shall appear just and proper to the council, the council are authorized and empowered to determine and establish the depth to which the real estate shall be charged and assessed with the cost of the improvement, and such depth shall be determined and established according to the benefits accruing to the property by reason of the improvement. The council shall include in the paving district all the real estate to be benefitted by such improvement and shall cause it to be charged and assessed with the cost of such paving or improvement as in this section hereinafter provided. The provisions of this section in regard to the depth to which real estate may be charged and assessed, shall apply to all special taxes that may be levied, except for sidewalk in proportion to the front or square feet. Whenever curbing, or curbing and guttering is done upon any street or avenue in any paving district in which paving has been ordered, and the council shall deem expedient so to do, they shall have power and authority, for the purpose of paying the cost of such curbing and guttering to cause to be issued bonds of the city, to be called "Curbing and Guttering Bonds of Paving District No.

————," payable in not exceeding ten years from date, and to bear interest payable annually, not exceeding the rate of six per cent. per annum, with interest coupons attached, and in such cases, shall assess at one time the total cost of such curbing and guttering, or curbing as the case may be, upon the property abutting or adjacent to the portion of the street or avenue so improved, according to special benefits; such assessment to beceme delinquent the same as the assessment of special taxes for paving purposes, and to draw the same rate of interest and be subject to the penalties, and may be paid in the same manner as special taxes for paving purposes, and the special taxes so assessed shall constitute a sinking fund for the payment of said bonds and interest, and said bonds shall not be sold for less than their par value, and no such special tax shall be declared void, nor shall any such assessment or part thereof, be set aside in consequence of any error or irregularity committed or appearing in any of the proceedings under this act or the acts of which it is amendatory; but any party feeling aggrieved by any such special tax or assessment or proceeding may pay the said special taxes assessed or levied upon his, her or its property or such installments thereof as may be due, at any time before the same shall become delinquent, under protest, and with notice in writing to the city collector that he intends to sue to recover the same, which notice shall particularly state the alleged grievance and grounds thereof, whereupon such party shall have the right to bring a civil action within sixty days thereafter, and

not later, to recover so much of the special taxes paid as he shall show to be illegal, inequitable and unjust, the cost to follow the judgment to be apportioned by the court as may seem proper, which remedy shall be exclusive. The city collector thall promptly report all such notices to the city council for such action as may be proper. No court shall entertain any complaint that the party was authorized to make, and did not make to the city council sitting as a board of equalization, nor any complaint not specified in said notice fully enough to advise the city of the exact nature thereof; nor any complaint that does not go to the groundwork equity and justice of the tax. The burden of proof to show such tax or part thereof invalid, inequitable or unjust, shall rest upon the party who brings such suit.

Provided, That the city council shall provide by ordinance, that upon the levying of any tax under the provisions of this act and the completion of the list or lists of the property in any of the districts taxed, five of its members shall be appointed as a board of equalization and review, and the list or lists shall be placed in the hands of said board, and the said board shall give public notice of the completion of the said lists and appoint not less that five consecutive days upon which they will meet during the usual business hours and state the place of its meeting, and during the time specified the said list or lists shall be open to public inspection, and any person or persons feeling themselves agrieved shall have hearing before said board, and the said board

shall have the authority to make correction of any tax deemed by them unequal or unjust.

Sec. 2. All horse, cable, steam, electric or other railway companies now existing or hereafter created in any city already incorporated or hereafter organized shall be required to pave or repave at their own cost all the space between its different rails and tracks and also a space two feet wide outside of the outside rails of the outside tracks, and the tracks herein referred to shall include not only the main tracks but also all side-tracks, crossings and turnouts used by such companies, and where two or more companies occupy the same street or alley with separate tracks, then each company shall be responsible for its proportion of the surface of the street or alley occupied by all the parallel tracks as herein required. Such paving or repaving by such railway companies shall be done at the same time and shall be of the same material and character as the paving or repaving of the streets or alleys upon which said railway track or tracks is located, unless other material be specially ordered by the board of public works.

Such railway companies shall be required to keep that portion of the street which they are herein required to pave or repave in good and proper repair, using for said purpose the same material as the street upon which the track or tracks are laid at the point of repair or such other material as the board of public works may require and order; and as streets are hereafter paved, or repaved, street railway companies shall be required to lay, in the best approved manner, a rail to be approved by the

board of public works. The tracks of all railway companies, when located upon the streets or avenues of the city shall be kept in repair and safe in all respects for the use of the traveling public, and said companies shall be liable for all damages resulting by reason of neglect to keep such tracks in repair, or for obstructing the streets or avenues of such city. For injuries to persons or property arising from the failure of such company to keep their tracks in proper repair and free from obstructions, such company shall be liable and the city shall be exempt from liability. The word "companies" as used in this act shall be taken to mean and include any persons, companies, corporations or associations owning or operating any street or other railway in any such city.

Sec. 3. In the event of the refusal of such company to pave, repave or repair as required in the foregoing sections, when so directed by the council, upon the paving or repaving of any street upon which their track is laid, the council shall have power to pave, repave or repair the same and the cost and expense of such paving, repaving or repairing may be collected by levy and sale of any property of said street railway company, in the same manner as special taxes are now or may be collected. Special taxes for the purpose of paying the cost of any such paving or repaving, macadamizing or repairing of any such street railway, may be levied upon the track, including the ties, iron, roadbed, and right of way, side-tracks, and appurtenances, including buildings and real estate belonging to any

such company or person and used for the purpose of such street railway business, all as one property; or upon such parts of such track, appurtenances and property or any part thereof as may be within the district paved, repaved, macadamized or repaired, and shall be a lien upon the property levied upon from the time of the levy until satisfied. No mortgage, conveyance, pledge transfer, or incumbrance of any such property or of any rolling stock or personal property of any such company or person, created or suffered by a company or party, after the time when any street or part thereof upon which any street railway shall have been laid, shall have been ordered paved, repaved, macadamized or repaired, shall be made or suffered except subject to the lien of such special taxes, if such levy be in contemplation. The city collector shall have the power and authority to sieze any personal property belonging to any such person or company for the satisfaction of any such special taxes when delinquent, and to sell the same upon advertisement and in the same manner as constables are now or may be authorized to sell personal property, upon execution at law; but failure so to do, shall in no wise affect or impair the lien of the tax or any proceeding allowed by law for the enforcement thereof. The railroad track or any other property upon which such special taxes shall be levied, or so much thereof as may be necessary, may be sold for the payment of such special taxes in the same manner and with the same effect as real estate upon which such special taxes may be levied, may be sold.

It shall also be competent for any such city to bring a civil action against any party owning or operating any such street railway, and liable to pay said taxes, to recover the amount thereof, or any part thereof delinquent and unpaid in any court having jurisdiction of the amount, and obtain judgment, and have the execution therefor and no property, real or personal, shall be exempt from any such execution.

Provided, That real estate shall not be levied upon by execution except by execution out of the district court on the judgment therein, or transcript of judgment filed therein, as is now or hereafter may be provided by law. No defense shall be allowed in any such civil action except such as goes to the groundwork, equity and justice of the tax, and the burden of proof shall rest upon the party assailing the tax. In case part of such special tax shall be shown to be invalid, unjust and inequitable, judgment shall be rendered for such amount, as is just and equitable. It shall be competent for the counsel upon the written application of any company, association, corporation or person, owning any such street railway, to provide that such special taxes shall become delinquent and be payable in installments, as in case of taxes levid upon abutting real estate as hereinafter provided, but such application shall be taken and deemed a waiver of any and all objections to such taxes and the validity thereof. Such application shall be made at or before the final levy of such taxes. The provision of this act in regard to the levy, collection, and enforcement of special taxes to pay

the costs of paving, repaving, macadamizing or repairing between the rails of street railways shall apply to such special taxes hereafter levied.

Sec. 4. The council shall have power, in any paving district, and it shall be their duty before the work of paving or repaving is done therein, to require water, gas and sewer connections to be made under such regulations and at such distances from the street mains to the line of the property abutting upon the street ordered paved or repaved, as may be prescribed by ordinance and shall require that such waterpipe connections may be made by any water works company owning the waterpipe main, and that such gas pipe connections may be made by any gas pipe company owning the gas pipe main. And upon neglect or failure of the water or gas companies to do the same, the board of public works may cause the same to be done, and the cost thereof shall be deducted from any indebtedness of the city to such companies, and no bills shall be paid to the said companies by the city until all such expense for pipe laying shall have been liquidated. And the council shall also have power, at any time, to assess the cost of any sewer connections and also of any water connections when the city owns the water and water pipe main upon the property opposite such connections, and to such depth as the council, sitting as a board of equalization, shall deem just and equitable.

Sec. 5. All special taxes to cover the cost of any public improvement herein authorized shall be levied and assessed on all blocks,

lots, parts of blocks and lots, lands and real estate bounding, abutting or adjacent to such (improvements or within the districts created for the purpose of making such improvement, to the extent of the benefits to such) lots, parts of lots, lands and real estate by reason of such improvement such benefits to be equal and uniform. Such assessments may be acording to the square foot or foot frontage, and may be pro-rated and scaled back from the line of such improvement and an allowance made for corner lots so that they shall not be assessed at full rate on both streets, according to such rules as the board of equalization shall consider fair and equitable; and all such assessment and finding of benefits shall not be subject to review in any legal or equitable action, except for fraud, gross injustice or mistake. *Provided*, That when any public improvement shall extend into or through any unsubdivided tract or parcel or parcels of land, said taxes shall be levied so as not to be charged against the real estate adjoining such improvement for a greater depth than the average distance through the subdivided real estate to be taxed for said purpose.

Sec. 6. It shall be sufficient, in any case, in making a levy or assessment of any tax, to describe the lot or piece of ground as the same is platted and recorded, although the same may belong to several persons; but in case any lot or piece of ground belongs to different persons, the owner of any part thereof may pay his proportion of the tax on such lot or piece of ground, and his proper share may be determined by the city collector.

Sec. 7. The cost and expense of grading, filling, culverting, curbing, guttering, or otherwise improving, constructing or repairing streets, avenues, alleys and sidewalks at their intersections, may be included in the special tax levied for the construction or improvement of any one street, avenue, alley or sidewalk, as may be deemed best by the council.

Sec. 8. Special taxes may be levied as the improvements are completed in front of or along, or upon any block or lot or part thereof or piece of ground, or at the time the improvement is entirely completed, or otherwise, as shall be provided in the ordinance levying the tax.

Sec. 9. When any special tax is levied it shall be the duty of the city recorder to deliver to the city collector a certified copy of the ordinance levying such tax, and such collector shall without delay give at least five days notice in one or more newspapers having general circulation in said city, of the time when such tax will become delinquent.

Sec. 10. Special taxes may be levied by the council for the purpose of paying the cost of constructing or reconstructing sewers or drains within the city; such taxes to be levied on the real estate lying and being within the sewerage district in which such sewerage or drain may be situated, to the extent of the benefits to such property, by reason of such improvement, the benefits to such property to be determined by the council, sitting as a board of equalization.

Provided, That in cases where the council sitting as such board of equalization, shall

find such benefits to be equal and uniform, such levy may be according to the front feet or square feet of lots or real estate within said sewerage district or according to such other rule as the council sitting as such board of equalization may adopt for such distribution or adjustment of such cost upon the lots or real estate in such district benefitted by such improvement; and all taxes or assessments made for sewerage or drainage purposes shall be collected in the same manner as other special assessments, and shall be subject to the same penalty.

Sec. 11. There shall be in each city of the first class a board of public works which shall consist of five members, residents and freeholders of the city, to be appointed by the council before the first Monday of July, 1890, for the term of two years. The council shall designate one of the members of such board to be the chairman thereof. The salaries of the members of such board of public works shall be fixed by ordinance and the salary of the chairman shall not exceed fifteen hundred ($1,500) dollars per annum and the salary of each of the other members shall not exceed the sum of five hundred ($500) dollars per annum. Each member of said board shall, before entering upon the discharge of his duties, take an oath to faithfully discharge the duties of his office, and enter into a bond to such city with two or more good and sufficient sureties, to be approved by the council, the bond of the chairman to be in the sum of fifteen thousand ($15,000) dollars, each conditioned for the

faithful performance of his duties as a member of such board of public works.

The chairman of such board shall devote all necessary time to the performance of his official duty, and no member of such board shall ever be directly or indirectly interested in any contract entered into by them on behalf of such city, nor shall he be interested either directly or indirectly in the purchase of any material to be used or applied in or about the use or purposes contemplated by this act. It shall be the duty of such board of public works, and it shall have power to make contracts on behalf of the city, for the performance of all such work and the erection of all such improvements as may be ordered by the council, but all such contracts shall be subject to the approval or rejection of the council; to superintend the performance of all such work and the erection of such improvements, except the supervision of the construction of city halls, market houses, jails or other public buildings. It shall also be the duty of said board to approve the estimates of the city engineer which may be made from time to time, of the value of work as the same may progress; to accept any work done or improvement made, when the same shall be fully completed according to contract, subject, however, to the approval of the council, and to perform such other duties as may be devolved upon them by ordinance. Any member of such board may at any time be removed from office by a vote of two-thirds of the members of the council, for sufficient cause and the proceedings in that behalf shall be entered in the journal of the council. *Pro-*

vided, That the council shall previously cause a copy of the charges preferred against such member sought to be removed, and notice of the time and place of hearing the same, to be served on him at least ten days previous to the time so assigned and opportunity to be given him to make his defense.

Sec. 12. Nothing in this act shall be so construed or held to authorize any city of the "first or second class," to issue bonds of the city either as district bonds, for paving the streets, or for paving said street intersections, or spaces opposite alleys in said city or for any purpose whatever to any amount beyond that fixed as the limit of the bonded indebtedness, of said city by congressional enactment.

Sec. 13. In all cases before the levy of any taxes for any improvements provided for in this act the city council shall give notice of intention to levy said taxes naming the purposes for which the taxes are to be levied, which notice shall be published at least twenty days in a newspaper published within such city. Such notice shall describe the improvements so proposed, the boundaries of the district to be affected or benefitted by such improvements; the estimated cost of such improvements and designate the time set for such hearing. If at or before the time so fixed written objections to such improvements signed by the owners of one-half of the front feet abutting upon that portion of the street, lane, avenue or alley to be so improved be not filed with the recorder the council shall be deemed to have acquired jurisdiction to order the making of such improvements.

Sec. 14. This act shall take effect on the first day of May one thousand eight hundred and ninety.

Approved March 13, 1890.

No. 127.

Supp. Brief of Kimball for Appt.

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In the Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 127.

OGDEN CITY, APPELLANT,

vs.

JAMES C. ARMSTRONG, WILLIAM DRIVER, J. H. SPARGO, ET. AL.

APPEAL FROM THE SUPREME COURT OF UTAH TERRITORY.

APPELLANT'S SUPPLEMENTARY BRIEF.

R. H. WHIPPLE,
T. D. JOHNSON,
Attorneys for Appellant.

JAMES N. KIMBALL,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1897.

OGDEN CITY, APPELLANT,

vs.

JAMES C. ARMSTRONG, WILLIAM DRIVER, J. H. SPARGO, ET. AL.

APPELLANT'S ADDITIONAL AND SUPPLEMENTAL BRIEF.

JURISDICTION.

Appellant's contention is that the publication of the notice of intention to pave for the full time required by law, and in proper form, and the giving of notice to the abutting owners when to appear and file their written objections, if any they had, gave the city council jurisdiction to decide upon all subsequent matters necessary to give it full jurisdiction or otherwise;—in this case upon the sufficiency of the protests. This is the only claim we make for the

notice of intention. The passing upon the objections was a judicial act. The city council decided that the owners of one-half of the frontage in feet abutting upon the improvement, had not filed written objections to the improvement, and of course, decided that it had jurisdiction to make the improvement. It had a right to make a decision of some kind.

If such decision is wrong and more than one-half did protest, and if extrinsic facts are necessary to be proven to show such facts, have the plaintiffs by a proper pleading brought themselves within the range of equitable relief?

Appellants contend that plaintiffs have done no such thing.

First.—If the tax is valid upon its face, as contended for by plaintiffs, and because of some extrinsic facts not shown on the face of the record, it is void, then plaintiffs must *explicitly allege all such facts* making it void, in their complaint. If the city council conspired to falsely decide as to the protests, or made a mistake, then such conspiracy, fraud or mistake, must be specifically pleaded in their complaint.

Heywood vs. City of Buffalo, 14 N. Y., 534, pg. opin. 541-2.

Davis vs. City of Chicago, 11 Wall. (U. S.) 110-111.

High on Injunctions, (3d Ed.) Secs. 34, 491, 492.

Ritter vs. Patch, 12 Cal. 298.

Coulson vs. Harris, 43 Miss. 728

The court in rendering its opinion in Heywood vs. City of Buffalo, says:

> "The complaint should have alleged distinctly and plainly that the proceedings were apparently within the powers of the common council, *and upon their face were valid*, and created a valid lien; and it should then have alleged that, notwithstanding such apparent validity, the proceedings were wholly void by reason of certain extrinsic matters, which should be stated, and which it should appear by the complaint, could only be established by other evidence. *These facts are the very grounds of the jurisdiction.* The doctrine established by the decisions is substantially this, that if the proceedings are void upon their face, they form no cloud upon the title no ground of interference by a court of equity, and if they are not void upon their face, but merely voidable or irregular, (what appellee contends for here), a court of equity will not take cognizance of them unless other facts are alleged sufficient to bring the matter clearly within some acknowledged head of equity jurisdiction. This is a sound and salutary rule, which should be steadily adhered to upon considerations of public interest and convenience if no other."

What is here said is clearly applicable in regard to what must be alleged as to multiplicity of suits, irreparable injury and cloud upon title. The facts must be stated in the complaint why a multiplicity of suits would be occasioned, why the free hold would suffer irreparable injury and why a cloud would be

cast upon the title. "The mere allegations that plaintiffs are without adequate remedy at law, etc., is a mere inference and must be made out by facts averred and proven."

> Shelton vs. Platt, 139 U. S., 591 pg. opin. 594-5-7.

In Dows vs. City of Chicago, 11 Wallace, U. S., Mr. Justice Field, quoting with approval from Heywood vs. City of Buffalo, supra, says:

> "This case is in conformity with the views herein expressed. Whenever a case case is made by the *pleadings* falling within either of these exceptions, the court said that equity would interfere to arrest excessive litigation, or prevent the irreparable injury or remove a cloud upon the title, but would not interfere where none of these circumstances existed. Upon principle this must be the case. The equitable powers of a court can only be invoked by the presentation of a case of equitable cognizance. There can be no such case at least in the federal courts, where there is a plain and adequate remedy at law."

On page 110 Mr. Justice Field said:

> "It *must appear* that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury, or where the property is real estate, throw a cloud upon the title, before the aid of a court of equity can be invoked."

How can it appear except by the allegations of the complaint. The mere assertion of the fact that multiplicity of suits, irreparable injury and cloud

upon title, is not sufficient. The allegations in the complaint must clearly state all the facts, showing these things should the tax be enforced. We submit that no such allegation or any allegation appear in the complaint showing that the collection of this tax would either cause a multiplicity of suits, work irreparable injury to the freehold, or cast a cloud upon the title. It would seem that the law as expressed in the case of Heywood vs. the City of Buffalo is settled in this court.

All facts appear on face of record.

Let us suppose that this tax is illegal because the owners of one-half or more of the frontage protested as required by Section XIII, Chapter 41, laws 1890, Utah. Does not all this appear on the face of the records of the city council? If it does so appear, then the plaintiffs have a speedy and adequate remedy at law. All the facts relied upon, viz., objections to the improvement, must be and were filed with the city recorder with the date of the filing indorsed thereon and hence became and are a part of the proceedings of the city council to levy the tax, and these papers with the indorsements, are and were at all times of record. The proceedings of the city council *only* is what must be considered. All the facts relied upon to invalidate this tax appear upon the face of those proceedings. It required no evidence *de hors* the record —or extrinsic evidence to prove these facts. Upon that record as it stood then and now the city council made its decision, viz., *that not one-half of the owners of the front feet had filed written objections as provided by statute.* That decision can only

be attacked for fraud or mistake on part of the council, but neither is alleged in the pleadings.

An examination of the record in this case will conclusively show that all these facts appear in the record of the city council as follows.

The original protest is set out in the complaint at pages 7 and 8, and marked filed as of March 28th, 1892, at 9:55 a. m.

All the withdrawals are found in the record at pages 144 and 145 and all are indorsed "filed" with the date.

The Elliott report is found at page 27 of record among the proceedings of the city council and all other proceedings in any way bearing upon this question or the proceedings to pave are found in the record at page 26 to 32.

These protests and withdrawals must be filed under the provisions of the law just quoted or the city council could not have considered them at all.

Now, again, if anything is necessary to be shown in the proceedings of the council in order to give it jurisdiction, or to deprive it of jurisdiction, such omission must have been the result of *fraud or mistake*; but does counsel claim that plaintiffs can have any standing in equity on the ground of fraud or mistake without having alleged either.

Appellees are now claiming that this tax is legal upon its face, while they at *the same time they are trying to show its illegality by facts which appear on the face of the proceedings of the city council to levy the tax*. Foulger, judge, in Marsh vs. City of Brooklyn,

59 N. Y. 281, states the conditions to entitle a party to invoke the aid of a court of equity to be:

> "When the claim or lien appears to be valid on its face, and when the defect can only be made to appear by extrinsic evidence which will not necessarily appear in proceedings by the claimant to enforce the lien."

This rule is cited and approved in Gest vs. the City of Brooklyn, 69 N. Y., 514, where the court uses these words:

> "Assuming therefore, that the points urged by the learned counsel for the appellant, shows substantial defects sufficient to invalidate the apportionment, and all subsequent proceedings, the plaintiff is in no danger of legal injury to his property. When attacked, the proceedings must all be shown by the claimant, except those immediately connected with the sale, such as notice, etc., and I do not understand that any defects are alleged in respect to them. The certificate given at the sale shows that the sale was made by the collector, and if he had no power to sell, a reference to the statute would be sufficient. So when the tax roll was produced, the want of a verification would appear on the face of the instrument."

So appellant says: The want of jurisdictional facts, if any are wanting, must necessarily appear on the face of these proceedings, and if facts appear in the proceedings, which deprive the city council of jurisdiction, then all the plaintiffs have a remedy at law.

Ewing vs. City of St. Louis, 5 Wall (U. S.) 413, pg. opin. 417 and 418.

Counsel for appellees admit the rule that no cloud can be cast upon the title if the proceedings are void upon their face. (Respondent's brief, page 49.) Appellant's position is:

First.—If the city council wrongfully took jurisdiction in face of the facts shown in or upon the face of its own proceedings, that it did not have it, then the tax is absolutely void, and plaintiffs must seek their remedy at law.

Second.—If the city council had wrongfully and falsely made its record to show facts sufficient to give it jurisdiction when such facts never existed, then in order to get into equity plaintiffs must plead all such facts and even in such case *certiorari* is a plain and perfect remedy, under Compiled Laws of Utah, sections 3718 to 3728.

CERTIORARI A PROPER REMEDY.

The remedy of the Writ of *Certiorari* is not only a common law remedy, but is one expressly provided by the statutes of the then territory of Utah. The chapter entitled "Writ of Review," section 3817 to 3728, inclusive, of Compiled Laws of Utah, 1888, is as follows:

> Sec. 3718. The writ of certiorari may be denominated the writ of review.
>
> Sec. 3719. A writ of review may be granted by any court, except a probate or justice's court, when an inferior tribunal, board or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy.

Sec. 3720. The application must be made on affidavit by the party beneficially interested, and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice.

Sec. 3721. The writ may be directed to the inferior tribunal, board or officer, or to any other person having the custody of the record or proceedings to be certified. When directed to a tribunal, the clerk, if there be one, must return the writ with the transcript required.

Sec. 3722. The writ of review must command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, a transcript of the record and proceeding (describing or referring to them with convenient certainty), that the same may be reviewed by the court, and requiring the party in the meantime to desist from further proceedings in the mat- to be reviewed.

Sec. 3723. If a stay of proceedings be not intended, the words requiring the stay must be omitted from the writ. These words may be inserted or omitted, in the sound discretion of the court, but if omitted, the power of the inferior court or officer is not suspended or the proceedings stayed.

Sec. 3724. The writ must be served in the same manner as a summons in a civil action, except when otherwise expressly directed by the court.

Sec. 3725. The review upon this writ cannot be extended, further than to deter-

mine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer.

Sec. 3726. If the return to the writ be defective, the court may order a further return to be made. When a full return has been made, the court must hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment, either affirming or annulling or modifying the proceedings below.

Sec. 3727. A copy of the judgment, signed by the clerk, must be transmitted to the inferior tribunal, board or officer, having the custody of the record or proceeding, certified up.

Sec. 3728. A copy of the judgment, signed by the clerk, entered upon or attached to the writ and return, constitute the judgment roll.

It would seem that this statute covers just such cases as this. Section 3719 provides:

Sec. 3719. A writ of review may be granted by any court, except a probate or justice's court, when an inferior tribunal, board or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy.

The findings of the district court and of the Supreme Court of Utah, are to the effect that the owners of more than one-half of the frontage in feet in said paving district protested against the contemplated improvement. The same facts are alleged in

the complaint. Counsel for appellees maintain that the written protest of these property owners when filed, operated to prevent the city council from acquiring jurisdiction; that nevertheless it proceeded as if it had jurisdiction and levied the assessment complained of. If these things are true then clearly the city council exceeded its jurisdiction and there being no appeal from its decision, and no "plain, speedy and adequate remedy" as counsel contends, and which for the purposes of this argument we may concede, it would seem that the case falls clearly within the provisions of this section, and by it appellees are afforded ample remedy.

> "It has been uniformly held by the courts that if certiorari affords a complete remedy, courts of equity will not interfere."
>
> Ewing vs. City of St. Louis, 5 Wall, (U. S.) 413 supra.
>
> Gilkey vs. Watertown, 141 Mass. 317.

As we have seen, if the city council had the authority to determine the question as to whether more or less than one-half of the owners of the frontage in feet had protested, and in determining this question in favor of their jurisdiction, placed their determination beyond the collateral attack of the appellees, as they seek to do by this action, then they must fail. If, on the other hand the jurisdiction was never acquired by reason of the protests filed, then appellee must fail because their remedy is by *certiorari*.

> Royce vs. Janney, 50 Iowa, 676.
>
> "When the remedy by *certiorari* is invoked every fact that goes to determine the

> jurisdiction or lack of it of the inferior tribunal, may be inquired into."
>
> Hastings vs. City and County, 18 Cal. 49, pg. opinion, 57, 58 and 59.
>
> Whiting vs. B. of D, 14 Cal. 480, pg. opin., 500-1-2.

Field, C. J., who delivered the opinion in Hastings vs. City and County of San Francisco, supra, on page 58 of the opinion, says:

> "All such bodies, without any special legislative provision by the general law, are subject, with certain exceptions, to the process of mandamus to enforce the performance of the duties devolved upon them, and to the writ of *certiorari* for the review of their acts, when partaking of a judicial character, and in other ways are within the control of judicial proceedings."

If *certiorari* has been invoked instead of the remedy adopted in this case, when this suit was begun and the proceedings of the city council found to be void, the tax now complained of could never have been levied. This sufficiently does away with the question of multiplicity of suits, because if plaintiffs or any of them had adopted the legal remedy open to them as provided by statute for just this kind of case, it would have ended the litigation for all time, and as to all parties interested.

MUTIPLICITY OF SUITS.

Counsel for appellees seem to be basing their right to maintain this suit in equity, *solely* on the ground that the collection of this tax will engender a

multiplicity of suits—practically admitting that they are unable to show that a cloud will be cast upon their title. This position raises two questions:

First.—Will injunction lie to restrain the collection of a tax upon the sole ground of multiplicity of suits, when no cloud will be cast upon the title and the free-hold suffer no irreparable injury?

Second.—Appellees having a plain and adequate remedy by *certiorari*, and having neglected or refused to adopt it, can they now invoke the jurisdiction of a court of equity on the ground of multiplicity of suits, or in fact upon any grounds?

Not admitting that the allegations of the complaint bring this case within any of the recognized exceptions to the rule that equity will grant relief in this class of cases by way of injunction to restrain the collection of a tax, we maintain that equity will not grant relief on the sole ground of multiplicity of suits.

We desire, however to argue the second question more at length. Appellants maintain, and we think without fear of successful contradiction, that *certiorari* is and was a plain, speedy and adequate remedy, and that it was open to any one or all of the plaintiffs, and that the results of that remedy would have been to settle all the questions that could possibly have been raised or be raised between any one or all of these plaintiffs and Ogden City. And as the plaintiffs neglected and refused to adopt that remedy they cannot now invoke the jurisdiction of a court of equity to relieve them of their mistake. To allow them to do so on the ground of multiplicity of suits, would be to reward the laches and neglect which has deprived each of his right to seek equitable relief.

McKinstry, J., in Lent vs. Tillotson, 72 Cal., on page 437 of opinion, in a case in many respects almost exactly like the one at bar, in commenting upon this subject, says:

> "It may be urged, however, that equity should entertain jurisdiction of a suit like the present 'to prevent multiplicity of actions.' The multiplicity of actions, which, it may be said (although in the absence of averment) the complainants here seek to avoid, would not injuriously affect any of them. In the mere external facts that all their remedial rights arose at the same time, are of the same kind, involve similar questions of fact, and depend upon the same questions of law. The question still remains: Will a suit be entertained to prevent multiplicity when it appears that no one of the plaintiffs could separately demand equitable relief? The cases sometimes supposed to do so, do not, when examined, answer the foregoing question in the affirmative."

On page 438 the same judge says:

> "Even if there are cases in which each of the several plaintiffs would be allowed to maintain a separate suit in equity, but yet all would be entitled to unite in one suit for the determination of questions which might arise in separate actions at law, the result herein must be the same. The plaintiffs by their acquiescence and consent, having lost their right to ask the aid of equity by injunction, the court ought not to have granted to all that which it should refuse to each. To grant the injunction to all, because each may be subjected to a separate action at law, is to reward the laches and neglect which has de-

prived each of his right to seek equitable relief."

The learned judge bases his opinion and decision (see page 434 of the opinion) on the grounds that the plaintiffs had a plain, speedy and adequate remedy at law by means of the writ of *certiorari*, and *having neglected* and *refused to use it*, they could not adopt the wrong remedy and ask a court of equity to take jurisdiction to help them out, and in support of his position he cites:

Ewing vs. City of St. Louis, 5 Wall, U. S. 413.

S. V. W. Co. vs. Bryant, 52 Cal. 132.

People vs. El Dorado, 8 Cal. 61.

People vs. Board of Delegates, 14 Cal. 479.

Cooley on Tax. p 771- 2nd ed.

COLLATERAL ATTACK.

Counsel for appellees (respondent's brief, page 33), says this is not a collateral attack on the judgment of the city council, meaning, of course the judgment of the counsel in deciding that the written objections to the improvement were not sufficient to legally prevent it from levying the tax. Appellants contend that counsel is in error in this, and that the plaintiffs in this action *are* collaterally attacking that judgment.

Van Fleet on Collateral Attack thus defines both direct and collateral attack:

"A direct attack on a judicial proceeding is an attempt to avoid or correct it in

> some manner provided by law. A motion for new trial, a motion to vacate, modify or correct a judgment according to statute, or the practice of the court, appeals, writ of error, certiorari. * Bills in equity or complaints and petitions *under the codes* to set aside, modify or correct judgment for fraud, accident or mistake."

It will be observed that bills in equity to correct, modify or set aside judgments, are *unknown to the code of Utah.* It will also be observed that in order to be a direct attack, the bill in equity must be a remedy provided by statute.

At Section 3, the author defines collateral attack:

> "A collateral attack on a judicial proceeding is an attempt to avoid or evade it or to deny its force and effect in some manner not provided by law."

The author in the last section, calls attention to the case of Morrill vs. Morrill, 25th Pac. Rep. 362 and 364, and says:

> "This definition assumes that a proceeding to annul or enjoin is always direct. It is direct *only* when pursued in the time and manner provided by law, and against one who is not a *bona fide* purchaser. As all judicial records must be tried by inspection, an attempt to overturn or overhaul them by evidence *de hors* in a proceedings not provided by law, *is a collateral attack.*"

At section 4, the author says: "All attempts to to use *extrinsic evidence is a collateral attack.*" In illustrating a case in which extrinsic evidence was offered, it is stated: "The court was undoubtedly

correct in holding the attack to be collateral, as the chancellor never interfered in that kind of a case, and the minority were clearly wrong in their contention *that a record fair on its face, could be falsified in another action.*"

At section 6 the author says: "An attempt to set aside a judgment by motion of petition filed at the wrong time, or in the wrong court; or an attempt to do so by the *wrong kind of proceeding*, is a collateral attack."

This is an attempt to set aside that judgment by the wrong kind of a proceeding. *Certiorari*, or *prohibition*, remedies plainly provided by the Utah law, would have been the proper remedy.

The difficulty in defining what is and what is not collateral attack undoubtedly arises from a lack of understanding of what constitutes jurisdiction to render the judgment.

> "The supreme power in each civilized state enacts general laws fixing the rights of persons under its dominion. Then it establishes judicial tribunals for the purpose of declaring and fixing such rights in particular cases. The power given by law to the tribunal to fix such rights is called its jurisdiction. *Jurisdiction is simply power.* The Supreme Court of the United States has defined it to be 'the power to hear and determine.' Any power possessed by the tribunal, either affirmative or negative, is jurisdiction. The principal trouble has arisen from the mistaken conception that jurisdiction depends upon facts or the actual existence of matters and things, instead of upon the allegations

made concerning them. If certain matters and things are alleged to be true and relief prayed which the tribunal has power to grant if true, that gives it jurisdiction over the proceedings, and it must proceed and determine them or neglect its duty. Jurisdiction does not relate to the rights of the parties, as between each other, but to the power of the court. The question, is have the parties shown a right to the relief which they seek, and has the court authority to determine whether or not they have shown such a right? A wrongful determination of the question first stated is error, but can be examined only on appeal or certiorari. The other question is the question of jurisdiction, which may be defined: Any movement in the cause; authority to move in a cause, even to determine that there is authority, the power to act upon a given state of facts and likewise to decide when they exist. Lawful authority to hear and determine the cause upon the allegations made; power to inquire into the facts; to apply the law and declare the judgment; the authority to decide the question at all; the power to hear and determine."

Van Fleet Collateral Attack, Sec. 58.

It can hardly be disputed that the city council under the law having first published the notice of intention and having created the district and having notified abutting owners to file written objections to the improvement, had the power and jurisdiction to decide upon the sufficiency of those written objections. The council on that occasion might take into consideration whether or not the parties, some or all,

owned the property which they claimed to own in the protest, and if so whether or not they owned the number of feet frontage mentioned in the protest, and whether or not the protest itself was in legal form or was for any purpose the written objections contemplated by the statute. All these things required action of a judicial nature, which in contemplation of the law under which they acted, they were compelled to decide or neglect their duty, and it makes no difference whether such decision was *right* or *wrong*. It cannot be collaterally attacked, because the statute of Utah provides a legal remedy by *certiorari* or *writ of review* covering just this class of cases and such remedy would have been speedy and adequate; would have been much less costly than the one adopted and would have fully settled the matter for all time and for all parties. It must be remembered that this action was brought before the assessment complained of was made.

Van Fleet on Collateral Attack, Sec. 50, says:

> "The *truth* of the allegation does not constitute jurisdiction. The tribunal must have jurisdiction before it can take any adverse step. Its jurisdiction necessarily has to be determined from the allegations assuming them to be true. This point is so important that it should not be overlooked. The question of jurisdiction does not depend upon the truth or falsehood of the charge, but upon its nature; it is determinable on the *commencement*, not at the *conclusion* of the inquiry."

So appellant says that the city council having published the notice of intention and taken such other preliminary steps as was necessary (and which were

decided properly taken by the Utah Supreme Court when this case was first before it), acquired the jurisdiction and power to pass upon the protests before any protests were filed because the jurisdictional power must have been in the council for that purpose before it could have entertained the protests at all.

In commenting upon a case very similar to the one at bar, the author farther along in the same section, says:

> "By making the order granting the prayer of the petition, the board must be taken to have decided that the company was such an one as was under the statute entitled to aid, and if in this respect it has committed an error, the decision is nevertheless binding and conclusive unless appealed from, and cannot be attacked collaterally, *as by injunction upon the collection of the tax.*"

At section 61, the same author says:

> "But why any distinction should be made between special and general proceedings I cannot understand," and farther along in the same section the author says: "Enough must appear either in the application or the order or somewhere on the face of the proceedings to call upon the court to proceed to act, and all agree that when that does appear the court had properly acquired jurisdiction, or in other words is properly set to work. And when this is so the proceeding is not void collaterally."

This is a collateral attack.

> Montgomery vs. Wassam, 15 N. E. Rep. 795.
>
> Montgomery vs. Wassam, 19 N. E. Rep. 184.

In 15 N. E., at page 795, supra., in which just this class of case is under consideration, the Supreme Court of Indiana says:

> "The suit is clearly a collateral assault upon the proceedings of the county board in the establishment and construction of the drain."

In 19 N. E. Rep., supra., the same court says:

> "In so far as the appellant's complaint challenges the sufficiency of the notice it is unquestionably a collateral attack; and as there is some notice and that notice has been adjudged sufficient by the tribunal invested in the first instance, with the authority of determining jurisdictional facts, the attack is unavailing."

Respectfully submitted,

R. H. WHIPPLE,
T. D. JOHNSON,
Attorneys for Appellants.

JAMES N. KIMBALL,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

NO. 127.

OGDEN CITY, APPELLANT,

vs.

JAMES C. ARMSTRONG, WILLIAM DRIVER, J. H. SPARGO ET. AL.

APPEAL FROM THE SUPREME COURT OF UTAH TERRITORY.

RESPONDENT'S BRIEF.

STATEMENT.

The original bill in this case was filed May 21, 1892, in the Fourth Judicial District Court of the late territory of Utah, against Ogden city, a municipal corporation, and its mayor and the members of its common council. (Rec. 7.) The relief sought therein was a perpetual injunction restraining the city and its officers

from levying assessments upon the real estate of the plaintiffs and of others similarly situated, for the purpose of paving a portion of Twenty-fifth street, known as paving district No. 2, in said city, and other relief. (Rec. 6.)

The bill alleges that the plaintiffs are residents and tax-payers in Ogden city, in Weber county, Utah territory, and bring the action concerning a matter of general interest to all tax-payers in said city, on behalf of plaintiffs, and of all others similarly situated; that the defendants, other than the defendant Ogden city, are the mayor and members of the common council of said city; that the said mayor and common council, acting in an organized capacity, did, on March 7, 1892, pass a so-called resolution or ordinance creating three paving districts in said city, numbered respectively 1, 2 and 3, district No. 2 (the only one embraced in the issues in this case) extending from the west line of Washington avenue to the west line of Wall avenue on Twenty-fifth street in said city; and that in pursuance of said so-called resolution or ordinance a notice of intention to create a district for paving and macadamizing Twenty-fifth street from the west line of Washington avenue to the west line of Wall avenue, to be known as district No. 2, and to defray the expense of such

improvement by local assessment, was published on March 9, 1892, by Ogden city. The said notice (which is set out *in haec verba* in the bill) prescribed the boundaries of Paving district No. 2, described the improvements proposed, gave the estimated cost of such improvements, and fixed the 29th day of March, 1892, as the day for hearing written objections to the assessments from any and all persons interested therein.

The bill then alleges that on March 29, 1892, at 9:55 o'clock a. m., sixty-nine owners of property within said paving district No. 2, and with a frontage on Twenty-fifth street, filed a petition with the city recorder of said city protesting against the levying of any local assessment against or upon their property for the purpose of paving said street within said district, a copy of which protest is made a part of the bill and attached thereto as an exhibit; that four other owners of property in said paving district with a frontage on Twenty-fifth street, before action was taken upon the former petition, also filed a petition protesting against assessing their property for the purpose of paving said street; that the whole number of feet owned by the first sixty-nine protestors within said paving district, and with a frontage on Twenty-fifth street is about 2455,

being more than one-half of the whole frontage on said street within said district liable to assessment for local improvements; that notwithstanding said protests of said abutting property owners, and without giving any other and further notice, and without giving any such notice as is required by law for the hearing of complaints of property owners, the mayor and members of the common council of said city passed a so-called resolution or ordinance to the effect that the city council proceed as speedily as possible to pave said Twenty-fifth street in district No. 2, with Utah sandstone blocks, that the city engineer prepare the necessary specifications at once, and that the competition for said work be restricted to *bona fide* residents of Ogden city; and that on May 2, 1892, the city recorder was instructed by a so-called resolution, to advertise for bids for the paving of said street in said district, which he thereupon did, by publishing a notice which is copied in the bill.

The ownership of specific parcels of land in said paving district, and owned in severalty by the plaintiffs respectively is then alleged, with the allegation that said property would be subject to a tax for local improvements in common with the other abutting property in said district, and that the plaintiffs file their

bill on behalf of themselves and all other owners of real estate in said district.

It is then alleged that it is the intention of the defendants to let a contract for the paving of said Twenty-fifth street in said paving district, and to levy a special tax for paying the expense thereof, upon the property of plaintiffs described in the bill, and also upon the land of other abutting property owners which may be liable for assessment in said district; that to pay the expense of said improvement the common council of Ogden city have under advisement an ordinance which provides for the paying of said expenses, and which has passed its first reading, which ordinance is made a part of the bill, and a copy thereof attached thereto; that the defendants, (officers of said city) claim they have a right to enter into a contract for paving said Twenty-fifth street, and to levy a special tax upon abutting property liable to assessment in said district; and that they intend to and will, unless restrained by order of court, enter into such contract for paving and levy such assessment upon said abutting property, which assessment will become a lien upon the property of plaintiffs, and upon all the abutting property of Twenty-fifth street in said paving district No. 2, which contract and levy will

cast a cloud upon the title of all of said real estate; that the proposed action of the mayor and members of the common council is entirely without authority and beyond their jurisdiction; that the notice of intention to create the paving district does not conform to the statute in certain particulars enumerated in the bill; that before said notice of intention to pave was published, no plans or specifications had been prepared, no particular kind of pavement had been adopted, no estimate had been made by the city engineer or any other officer of said city, and that the statement in the notice was of a gross sum, without any reference to the actual or any estimate of the cost; that there are many different kinds of paving (enumerating them) varying in cost from one dollar to four dollars per square yard; that many other real estate owners in said district would have signed the protest against paving if they had not been informed by certain members of the common council of said city that a majority of the real estate owners in said district should determine the material to be used in paving therein; that the plaintiffs have no plain, speedy and adequate remedy at law, and that unless the court shall interfere by an order and decree restraining said defendants, the said defendants will levy a tax

upon the plaintiffs, and upon all of the property of other real estate owners similarly situated, which is illegal and void, and will cast a cloud upon all of said real estate, and that the defendants, unless restrained by order and decree of the court, will enter into a contract for the doing of the work above set out, which, if illegal and void, will engender a multiplicity of suits upon Ogden city and upon plaintiffs and all others similarly situated; and that great and irreparable injury will result to the plaintiffs and to all others similarly situated if said assessments are made and said contract for paving is entered into by the defendants. (Rec. 1-6.)

The foregoing is a fair summary of such portions of the bill as are essential to a proper consideration of the questions involved in this action. To this bill a demurrer was interposed, which was ordered sustained by the court below, and, the plaintiffs declining to amend the bill and electing to stand thereon, judgment was entered dismissing the bill, and for costs. From this judgment and order plaintiffs appealed to the Supreme Court of the territory, when both the judgment and order were reversed and the cause remanded to the court below.

Armstrong v. Ogden city, 9 Utah, 255.

Thereupon, on the 6th day of April, 1894, the defendants filed an answer to the bill denying the major portion thereof, and admitting certain allegations which it is unnecessary to specifically recount at this place. Suffice it to say that the answer denies substantially all of the equities of tne bill. (Rec. 10-15.)

Thereafter and on the 9th day of April, 1894, the plaintiffs filed a supplemental bill alleging the filing of the original bill, with a brief recapitulation of its contents and the prayer thereof, the filing of the demurrer thereto, the order made by the District Court sustaining the demurrer, the appeal to the Territorial Supreme Court from the order and judgment on the demurrer, and the reversal of said order and judgment by the latter court. The supplemental bill then alleges the names of a large number of owners of real property in said paving district No. 2, who have elected to come into the action as parties plaintiff, and the original plaintiffs ask that the additional persons so named therein may be made parties plaintiff. It is also alleged in said supplemental bill that the defendants, after the commencement of the action, to-wit: on March 22, 1893, passed the ordinance, a copy of which is attached to the original bill, which ordinance is alleged to be invalid, and that said defen-

dants, in pursuance of said invalid ordinance and invalid proceedings of the city, its officers and agents, were about to expose the real estate described in the original and supplemental bills to satisfy the illegal assessments attempted to be levied thereon, and threatened to continue to sell said real estate annually for ten years as each installment of said assessment became due; that the plaintiffs protested against the sale of their property and the creation of a cloud upon their respective titles, but that said city and its officers and agents insisted upon said sale, whereupon the plaintiffs and each and all of them were compelled by the defendants to pay certain amounts, stated in detail, in order to prevent a sale of their property and prevent a cloud upon their respective titles; and that certain real estate belonging to some of the plaintiffs was sold by the city to satisfy the illegal assessments. The prayer is substantially that of the original bill with the additional prayer that an account be taken of the amounts paid by plaintiffs under protest, that plaintiffs have judgment for the same, that the sales of real estate may be set aside and annulled, and for general relief. (Rec. 15-19.)

The answer to the supplemental bill denies specifically all of its allegations except it

is admitted that the ordinance in question was passed as alleged. It is then alleged affirmatively that the plaintiffs are estopped to complain as in the supplemental bill alleged, that the same does not state facts sufficient to constitute a supplemental complaint, that the cause of action set up and stated therein is barred by the statute of limitations, that there is a misjoinder of parties plaintiff, and that there is a misjoinder of causes of action. (Rec. 19-25.)

On these pleadings the case was tried, and on the 27th day of October, 1894, findings were signed, and judgment entered giving plaintiffs the relief prayed for in both the original and supplemental bills. (Rec. 184-9.)

The defendants moved for a new trial upon the two statutory grounds:

1. Insufficiency of the evidence to justify the decision and that the decision is against law.

2. Errors in law occurring at the trial and excepted to by the defendants. (Rec. 192.)

The motion for a new trial was denied and thereupon the defendants appealed to the Supreme Court of the territory from the judgment and from the order denying the motion for a new trial. (Rec. 194-195); and in that

court both the judgment and the order were affirmed. (Rec. 196-200.)

Armstrong v. Ogden city, 12 Utah, 477.

The defendant, Ogden city, has prosecuted an appeal to this court from the judgment of the Supreme Court of the territory of Utah.

In discussing *seriatum* the errors assigned by the appellant, such of the facts will be recited and discussed as are important to a proper understanding of the questions raised.

APPELLANT'S SPECIFICATION OF ERRORS.

The errors assigned by the appellant, as set forth in its brief (pp. 29-33) are nine in number, and will be discussed in the order in which they are recited in the brief as nearly as an intelligent discussion will permit.

I.

The effect of the decree in this case is:

a.—To perpetually enjoin the collection of a local assessment levied by the common council of Ogden city upon the property of appellees and others to defray the expense of paving.

b.—To adjudge said asssessment invalid.

c.—To remove the cloud upon the title of the real estate of appellees, created by said invalid assessment.

d.—To decree void sales of real estate belonging to some of the appellees pursuant to said assessment.

e.—To require the appellant to repay to some of the appellees such amounts respectively as were paid by them under protest. (Rec. 188-89).

It is first urged by consel for appellants that the case is not one of equitable cognizance for the reason that it is brought to restrain the collection of a tax levied by the common council of Ogden city, an inferior tribunal of special jurisdiction, and it not being alleged that it is necessary to restrain the collection thereof, in order to prevent a multiplicity of suits or irreparable injury, or the throwing of a cloud upon appellees' title; and it not appearing that the proceeding sought to be enjoined and annulled is valid upon its face, and that the alleged invalidity consists in matter to be established by extrinic evidence.

At the very outset we take issue with counsel for appellants in their reading of the record, and insist that the court was right in enjoining the collection of the tax in question and giving the other relief, because, it appears from the pleadings and proofs, that:

1.—The tax was illegal
2.—The enforcement of the tax would:
a.—Lead to a multiplicity of suits.
b.—Produce irreparable injury.
c.—Throw a cloud upon title.
3.—The illegality of the tax does not appear upon the face of the proceedings and therefore,
4.—Extrinsic evidence is necessary to establish the invalidity of the tax.

A.

The Special Assessment was Illegal, Because the City Council had no Jurisdiction to Levy It.

That the tax sought to be collected was illegal, sufficiently appears both from the allegations of the bill and from the evidence adduced. The proceedings were initiated and the tax attempted to be levied and collected under the provisions of chapter 41 of the Session Laws of 1890 of the late Territory of Utah, which act is printed as an appendix to appellant's brief. Section 1 of said act provides, among other things, that the city council

> "Shall have power to pave, repave or macadamize any street or alley, or part thereof in the city, and for that purpose to create suitable paving districts, which shall be consecutively numbered." * * *

The cost of paving, macadamizing or repaving of the streets and alleys within any paving district, except the intersection of streets and space opposite alleys within such district, shall be assessed upon the lots and lands abutting upon the streets and alleys in such district, in proportion to the square feet or feet front or both so abutting upon such streets and alleys. The assessments of special taxes for paving purposes herein provided for, shall be made as follows:

The total costs of the improvement shall be levied at one time upon the property and become delinquent as herein provided:

One-tenth (1-10) of the total amount shall be delinquent in fifty days after such levy, one-tenth (1-10) in one year, one-tenth (1-10) in two years, one-tenth (1-10) in three years, one-tenth (1-10) in four years, one-tenth (1-10) in five years, one-tenth (1-10) in six years, one-tenth (1-10) in seven years, one-tenth (1-10) in eight years, and one-tenth (1-10) in nine years; each of said installments, except the first shall draw interest at the rate of seven per cent. per annum from the time of levy aforesaid, until the same shall become delinquent, and after the same shall become delinquent, interest at the rate of 10 per cent. per annum shall be paid thereon. Such taxes shall be collected and

enforced as in other cases of special taxes. ***

Section 5 of said act reads as follows:

"All special taxes to cover the cost of any public improvement herein authorized shall be levied and assessed on all blocks, lots, parts of blocks and lots, lands and real estate bounding, abutting or adjacent to such (improvements or within the districts created for the purpose of making such improvement, to the extent of the benefits to such) lots, parts of lots, lands and real estate by reason of such improvement such benefits to be equal and uniform. Such assessments may be according to the square foot or feet frontage, and may be prorated and scaled back from the line of such improvement and an allowance made for corner lots so that they shall not be assessed at full rate on both streets, according to such rules as the board of equalization shall consider fair and equitable; and all such assessment and finding of benefits shall not be subject to review in any legal or equitable action, except for fraud, gross injustice or mistake. Provided, That when any public improvement shall extend into or through any unsub-divided tract or parcel or parcels of land, said taxes shall be levied so as not to be charged against the real estate adjoining such improvement

for a greater depth than the average distance through the sub-divided real estate to be taxed for said purpose."

Section 9 thereof is in the following language:

"When any special tax is levied it shall be the duty of the city recorder to deliver to the city collector a certified copy of the ordinance levying such tax, and such collector shall without delay give at least five days notice in one or more newspapers having general circulation in said city, of the time when such tax will become delinquent."

Section 13 reads as follows:

"In all cases before the levy of any taxes for any improvements provided for in this act the city council shall give notice of intention to levy said taxes naming the purposes for which the taxes are to be levied, which notice shall be published at least twenty days in a newspaper published within such city. Such notice shall describe the improvements so proposed, the boundaries of the district to be affected or benefitted by such improvements; the estimated cost of such improvements and designate the time set for such hearing. If at or before the time so fixed written objections to such improvements signed by the owners of one-half of the front feet abutting upon that portion of the

> street, lane, avenue or alley to be so improved be not filed with the recorder the council shall be deemed to have acquired jurisdiction to order the making of such improvements."

Pursuant to the power conferred upon that body by Section 1 heretofore quoted, the city council of Ogden city passed a resolution creating three paving districts to be known as No.'s 1, 2 and 3. (Rec. 26), ordered a notice of intention to levy a tax for paving purposes in district No. 2, to be prepared, (Rec. 26), and, after its preparation, adopted the same, and ordered that it be published for a period of twenty days, (Rec. 26; finding 4, Rec. 184-185.) The original bill alleges, (Rec. 2), the answer thereto expressly admits (Rec. 11), and the trial court finds (Rec. 185), that the notice of intention to pave in district No. 2, and to defray the expense thereof by levying a local tax on abutting property owners, was published on the 9th day of March, 1892. In said notice of intention it is recited that the city council will, on March 29, 1892, at 10 o'clock a. m., hear objections in writing from any and all persons interested in said local assessment. (Rec. 185). These facts have an important bearing on the question of the legality of the tax thereafter levied by the council. Section

13, *supra*, provides that if at or before the time fixed in the notice of intention, written objections to such improvements (paving) signed by the owners of one-half of the front feet abutting upon that portion of the street to be improved *be not filed* with the recorder, *the council shall be deemed to have acquired jurisdiction to order the making of such improvements.* While the statute does not so declare in *totidem verbis*, yet the counter proposition is manifestly implied, that if written objections to the paving, signed by the owners of one-half or more of the front feet abutting upon the streets to be paved *be filed* with the recorder at or before the time fixed for hearing the objections, *then the council cannot acquire jurisdiction* to levy the local tax or proceed with the improvements. The power of the council to pave and to levy a local tax to defray the expense thereof, depends upon the assent (by failure to object) of the owners of more than one-half of the front feet abutting on the street or streets to be paved. The source of the power is in the tax-payers. If the required number object the power is not conferred. If they consent the council may proceed to levy the tax and to make the improvement. The fact of consent of the requisite number is jurisdictional; and that consent (or in the case at bar, a failure to

object) is a condition precedent to the exercise of the power.

2 Dillon Mun. Corp. Sec. 800 and cases cited.

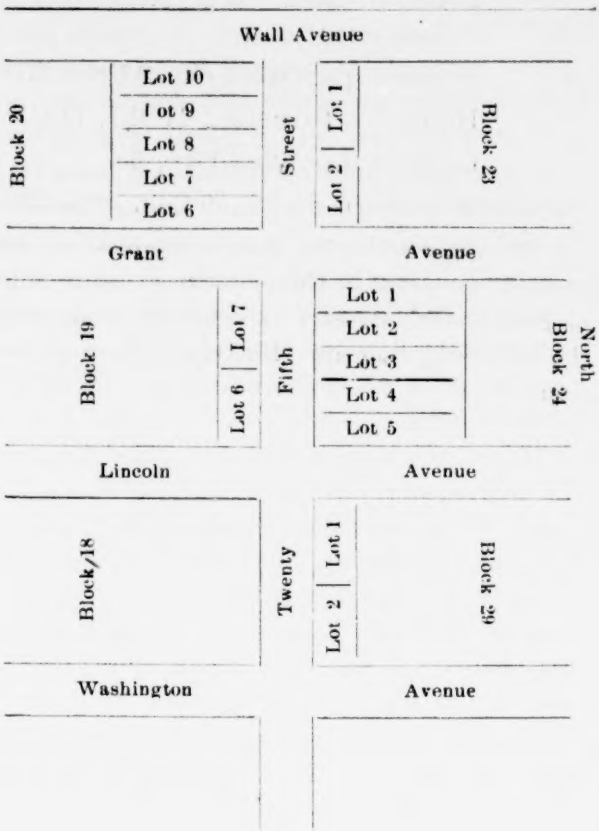
Armstrong v. Ogden city, 9 Utah, 255.

Holland v. Baltimore, 11 Md., 186.

Cooly on Tax, (2nd Ed)., 657.

Mulligan v. Smith, 59 Cal., 206, 229.

Paving district No. 2 as attempted to be created, consisted of three blocks on each side of Twenty-fifth street, or six blocks in all, and the following diagram illustrates their situation:


Wall Avenue
Block 20
Lot 10
Lot 9
Lot 8
Lot 7
Lot 6
Street
Lot 1
Lot 2
Block 23
Grant
Avenue
Block 19
Lot 7
Lot 6
Fifth
Lot 1
Lot 2
Lot 3
Lot 4
Lot 5
North
Block 24
Lincoln
Avenue
Block 18
Twenty
Lot 1
Lot 2
Block 29
Washington
Avenue

We are now insisting that the levying of this paving tax was illegal; and if we demonstrate that the owners of more than one-half of the front feet abutting upon the streets in said paving district objected to, and protested against, such paving, then it follows that the subsequent levy of the paving tax was illegal. For if the requisite number of such abutting owners, under section 13 aforesaid, objected to the improvement on or before March 29th, 1892, then the whole proceedings in levying and collecting the tax, and in selling property in enforcing it, were *coram non judice* and therefore null and void.

Dillon Mun. Corp. Sec. 800 and cases cited.

Holland v. Baltimore, 11 Md. 186.

State v. Elizabeth, 30 N. J. L. 176.

In re Sharp, 56 N. Y. 257.

People v. Brooklyn, 71 N. Y, 495.

Boyle v. Brooklyn, Id. 1.

Turrill v. Grattan, 52 Cal. 97.

The idea that underlies all levies of special assessments for local improvements upon contiguous property is that such property is specially benefitted thereby in the enhancement of its value, and section 13 of the statute was in-

tended to give abutting property owners the option of accepting or rejecting such benefits.

Cooley Taxation, 606.

Illinois Cent. R. R. Co. v City of Decatur, 147, U. S. 190.

It is not seriously contended, however, that the proceedings in levying and collecting the special assessment in the case at bar are valid, if the owners of more than one-half of the front feet of the contiguous property in said taxing district objected to said improvement. Did such a number of owners object to such improvement?

The sixth finding of fact of the trial court establishes that the total number of feet fronting on 25th street (the only street in the district) in said paving district was 3960; that the owners of more than one-half, to wit 2414 of said contiguous front feet, before 10 o'clock a. m. of March 29th, 1892, (the day designated in the notice of intention upon which to hear objections) filed a protest with the city recorder of Ogden city, protesting against the levying of any local assessment against or upon their property for the purpose of paving said street within said paving district; and that after 10 o'clock a. m. of said day the owners of 302½ front feet withdrew their protests, thereby leav-

ing at all times 2111¾ feet frontage still protesting against said local assessment. (Rec. 185.) According to this finding therefore, giving the appellant the benefit of withdrawals, *the majority protesting amounts to 263½*. This finding, as well as all others in the case, were sustained by the Supreme Court of the Territory of Utah, and a general judgment of affirmance was rendered by that court. (Rec. 196-200).

Armstrong v. Ogden city, 12 Utah, 477.

The Supreme Court of the territory, therefore, in effect, adopted the findings of fact of the District Court as its own for the purposes of an appeal to this court. Under the Act of Congress "Concerning the Practice in Territorial Courts and Appeals Therefrom" approved April 7th, 1874, the examination of this court is limited to the inquiry whether the decree can be sustained upon those findings, outside of questions of law arising upon the admission or rejection of evidence. This court cannot consider the weight of the evidence nor its sufficiency to support the findings. In other words, the findings of fact of the territorial District Court, adopted by the territorial Supreme Court, must be accepted as true by this Court.

Act of April 7, 1874, 18 Stat. at L. 27, Chap. 80.

Stringfellow v. Cain, 99 U. S. 610.

Cannon v. Pratt, 99 U. S. 619.

Mammoth mining Co. v. Salt Lake F. & M. Co. 151 U. S. 447.

Idaho and O. Land Imp. Co. v. Bradbury, 132 U. S. 509, 515.

We have already seen that the majority of front feet protesting according to the finding of the court, was 263½, but we call attention to another fact in this connection: the court also found that, of the total of 3960 front feet in the district, *785 feet thereof belonged to Ogden city and was used for public purposes by said city. (Rec. 185-6.)* The foregoing diagram shows that there are six blocks in the paving district, each with a frontage of 660 feet. This is an admitted fact in the case (Rec. 55). It is established by the aforesaid finding of fact, and is an admitted fact in the case, that the entire frontage of block 18, amounting to 660 feet in the paving district, was owned by the city and used for public purposes, and that 125 feet of the frontage in block 19 was owned by the city and used for public school purposes. (Rec. 55, 185; see also diagram, Rec. 142-3).

Should said 685 front feet which are owned

by the city, and used exclusively for public purposes, be considered as either objecting or consenting to the paving of the streets in this paving district? We insist not. The city claimed the right to count this public property in *favor of paving;* but the Supreme Court of the territory answered this contention most conclusively in the following language:

> "The total frontage of the district was 3960 feet. The lowest number protesting, after deducting withdrawals, as claimed by appellant, was 1878½ feet. But included in the 3960 feet were 660 feet owned by the city and used for city hall purposes, which the city council claimed the right to count in favor of the improving (improvement?), notwithstanding it was excluded in the paving ordinance from the property upon which the paving tax was levied, and notwithstanding the entire estimated expense of $40,000 for the improvement was levied upon the remaining 3300 feet, by assessing $12.00 against each of these last named front feet. If appellant's position were right, the statute permitting property owners in local assessment districts to vote against any proposed improvement would become entirely inoperative, at all events, so far as property owners living in close promoxity to public property is (are?) concerned. If, for instance the city council should create

> a paving district out of the four portions of streets that surround a square used exclusively for city purposes, it would only be necessary to secure the consent of the owner of a single front foot of the property abutting upon the opposite side of the street from the public square to abstain from protesting, and the remaining frontage would not only be powerless to prevent the improvement, but would be compelled to pay practically the entire expenses."
>
> 12 Utah, 493-4.
>
> Rec. 199.

Therefore, excluding this 785 feet from consideration, as we are bound to do, there remained a frontage of 3175 feet in the district. Deduct therefrom the total number of feet protesting according to the finding of the court ($2111\frac{3}{4}$), and the result is that a majority of $1048\frac{1}{2}$ front feet in the district *subject to the special assessment* protested against paving in the district. The court also found that *after 10 o'clock a. m. of March 29th, 1892*, certain persons who had protested, to the amount of $302\frac{1}{4}$ front feet, withdrew their protests (Rec. 185), and said $302\frac{1}{4}$ front feet were deducted before the balance of $2111\frac{3}{4}$ front feet protesting was arrived at. But should an owner of front feet who had protested *before* the expiration or the

time for filing protests, be permitted *after* the expiration of such time, to withdraw his protest, and thereby have his property counted in favor of paving? Again we say not. These withdrawals were attempted to be counted by the city in the territorial District and Supreme Courts as in favor of paving, it being insisted that thereby the city council acquired jurisdiction to proceed with the improvement. But the following language of the Supreme Court upon that question is a complete answer to such contention:

> "But appellants contend that, even if the decision of the city council was not conclusive, it was a correct finding of fact. They admit that at the time appointed more than one-half of the front feet abutting upon the street had objected, but contend that the owners of a sufficient number of front feet withdrew their protest, and that, therefore, the city council acquired jurisdiction to proceed with the improvement. The statute above referred to sufficiently answers this contention. It expressly denies to the city council jurisdiction to proceed with the improvements, if, at the time fixed to hear objections, a sufficient remonstrance is presented. At that time such a remonstrance was presented. The city council was thereby wholly deprived of power to proceed.

> No power could be subsequently acquired in that proceeding. A new proceeding might be instituted, and after due notice of intention, new power could be obtained The parties protesting and not withdrawing acquired a right to rely upon the statute existing at the time appointed to hear objections, and were entitled to notice of any action affecting their interests. It may also be that others who desired to object refrained from so doing upon ascertaining that a sufficient protest was already filed. Jersey city Brewing Co. v. Jersey city, 42 N. J. Law, 575; Vanderbeck v. Jersey city, 44 N. J. Law, 626. Supposing that, at the time appointed to hear objections, less than one-half of the frontage abutting on the street had protested, would it then have been seriously contended that thereafter, and before the city council acted upon the protest, enough more protests could have been filed to defeat the improvements? If that could not have been done, clearly, the reverse could not be done, either." (Rec. 198.)

In support of the conclusion reached in the foregoing excerpt from its opinion, the court cites the cases of *Jersey City Brewery Co., v. Jersey city, 42 N. J. Law, 575*, and *Vanderbeck v. Jersey city, 44 N. J. Law, 626*. In both of these cases this identical question was consid-

ered, and decided against the position taken by appellant.

Therefore, counting such $302\frac{1}{4}$ feet against the paving, because of having protested in writing against such improvement, augments the majority protesting against paving to the number of $1350\frac{3}{4}$ contiguous front feet. But either including in, or excluding from, the ranks of the objectors, the public property of 785 front feet, and the withdrawals of $302\frac{1}{4}$ front feet, the result still remains, according to the finding of the trial court, which is conclusive in this court, that before the time designated in the notice of intention, written objections to paving in this district signed by the owners of more than one-half of the front feet abutting upon the streets to be paved in said district, were filed with the city recorder of the city. It follows, therefore, that we have established our first proposition, that the council failed to acquire jurisdiction to levy the special assessment, and that its subsequent attempt to levy and collect the same was *coram non judice* and therefore null and void. But counsel for appellant in this connection make the point that the city council acquired jurisdiction to make the improvement by the publication of the notice of intention as required by section 13 of the statute *supra* and that being a tri-

bunal of special and original jurisdiction, that body had exclusive jurisdiction to decide the question of fact whether or not a majority had protested against the improvement; and that its decision on such question of fact that a sufficient number had not protested is final and conclusive as against what is termed a collateral attack in a court of equity to set aside the assessment and enjoin its collection.

That such a contention is erroneous can be readily demonstrated. In the first place *the council did not acquire jurisdiction to pave by publishing its notice of intention to do so* as required by section 13 *supra*. If protests, sufficient in number, be not filed at or before the time designated for the filing thereof in the notice of intention, then, *and not till then*, shall the council "be deemed to have acquired jurisdiction to order the making of such improvement." Jurisdiction does not attach when the notice of intention is published, but when the owners of at least one-half of the contiguous front feet consent to the improvement by failing to object thereto. As Dillon on Mun. Corp. says:

> "When the power to pave depends upon the assent or petition of a given number or proportion of the proprietors to be affected, *this fact is jurisdictional*, etc."
>
> Section 800, Fourth Ed

The notice of intention is in effect simply a notice that the city intends to pave, *if the tax-payers consent*, that it will make a certain improvement, *if the requisite number of owners of contiguous front feet will confer jurisdiction.* When the notice is published there is no jurisdiction, and the city council cannot determine that it will or will not have jurisdiction *until the expiration of the statutory period of publication*, —twenty days. A given number of the owners of contiguous property in this paving district could at their option either withhold or confer jurisdiction. If the requisite number protested on the *20th day* of the publication of the notice, and thereby withheld jurisdiction from the council, how can it be said that that body had jurisdiction on the *first* day of publication. If the source of the power to pave is in the tax-payers and not in the council, how can the council acquire jurisdiction to pave until the tax-payers have conferred that power by a failure to object to its exercise? If the power is vested in the tax-payers, how can any other body or tribunal exercise that power until the tax-payers have transferred it? And they unquestionably do not relinquish it, or consent to its exercise by the council, until the notice of intention is published the statutory period of time; and at no earlier moment

than that can it be ascertained whether consent has been given or not. In the second place *this action is not a collateral attack* upon the finding made by the city council that the proprietors of a majority of the abutting front feet consented to the paving by failing to object thereto. It is a *direct* attempt to impeach the proceedings of the council in this matter. The legality of their proceedings is directly challenged by specific allegations in the bill; and the appellant answered such allegations, thereby presenting issues upon which the case was tried. The principal ground relied upon to set aside the proceedings was lack of jurisdiction; and, as we shall fully show hereafter, jurisdiction appeared upon the face of the record. It follows therefore that the contention of appellants counsel, that *certiorari* was the proper remedy is erroneous. Jurisdiction appearing on the face of the record, the remedy by *certiorari* was unavailable. What then could the complaining tax payers do but resort to a court of equity and directly challenge the legality of the tax? The statute authorizing the levy of special assessments makes no provision for an appeal to any other tribunal from any judgment or decision of the city council. There being no remedy either by *certiorari* or appeal, what could the tax-

payers do except to seek relief in a court of equity? The contention of appellant's counsel that a proceeding in equity to set aside the tax is a collateral attack is equivalent to saying that the decision and finding of the city council is final and conclusive against any attack whatever, and that that tribunal is a court both of first and last resort with supreme power to finally determine all questions arising in levying and collecting a local assessment, even the question of its own jurisdiction. If the municipal council of this city have such trancendant authority, then confiscation of the property of the citizen is within the range of possibilities. But that this is a direct attack on the judgment and finding of the city council is certain.

> "A direct attack on a judicial proceeding is an attempt to avoid or correct it in some manner provided by law. A motion for a new trial * * * * bills in equity or complaints and petitions under the codes to set aside, vacate, modify or correct judgments * * * * *are direct attacks.*"
>
> Van Fleet Coll. Att. Sec. 2.

It is conceded that the city council, while not in the strict sense of the term, a court, in finding that a given number of tax-payers did

not protest against paving, is exercising judicial functions, and the finding is in one sense a judgment. And any proceeding (such as this is) instituted for the express purpose of setting aside and annulling a judgment and of enjoining its execution is a direct and not a collateral attack on that judgment.

Hurlbut v. Thomas, 55 Conn. 181.

Penrose v. McKinzie, 116 Ind. 35.

Morrill v. Morrill, 20 Or., 96.

S. C. 25 Pac. Rep. 362, 364.

Dady v. Brown, 76 Iowa, 328.

S. C. 41 N. W. Rep. 209.

McNeil v. Edie, 24 Kan., 108.

Gage v. Busse, 114 Ill., 589.

It is not sought in this case to have a court of equity sit as a court of review for the correction of errors or irregularities, for the judgment of the city council is not attempted to be impeached for mere errors or irregularities. The judgment and proceedings of the council is attacked upon the ground that there was a total want of jurisdiction over the subject matter. Another reason why the decision of the city council cannot be included in the category of judgments proper, is that such decision is entered *exparte*. The tax-payers were

not parties to the proceedings in levying the tax in the sense that they had a right to be, or were, heard. The owners of an actual majority of the abutting front feet in this paving district, protested in writing against the paving; but the city council erroneously determined, after making an *exparte* investigation, that such a majority had not protested. The statute makes no provision for a hearing to which the abutting owners are made parties, or at which they are entitled to be heard. Neither is there any provision authorizing a motion for a new trial, an appeal, a writ of error, or any other procedure to cure defects, or correct errors or irregularities, or to have the whole proceedings vacated as being absolutely void for having been entered and carried on by a tribunal totally without jurisdiction. The judgment, if such it may be called, was entered without pleadings, without evidence, and without parties, and without any hearing having been had. Under such circumstances it is a misnomer to call the decision of the council a judgment, and the record of such a decision is certainly not protected from a direct attack in a court of equity upon the ground that it is void as having been made and entered by a tribunal without jurisdiction of the subject matter.

In the third place, counsel urge that the

finding of the city council that the owners of a majority of the frontage did not object to the paving is conclusive, and cannot be attacked and disputed in an action to set aside the assessment and enjoin its collection. It must be remembered that there is no provision of the statute which confers upon the council the power to finally adjudicate this question of fact. Section 13 *supra* of the statute simply says that if a given number do not file objections, the council shall acquire jurisdiction, but the statute is silent as to what tribunal shall determine whether such a number has protested. That question is a question of fact in this case, and we insist that the appellees were not precluded from showing the falsity of the record of the council on that question, which at most is only *prima facie* evidence of the facts recited therein. We are referred to no authority which decides that a tribunal of special and inferior jurisdiction can resolve that a truth is a falsehood to make it so. On the contrary the authorities do establish the doctrine, founded upon common sense and sound legal principles, tnat the finding of the city authorities that the requisite number had assented or petitioned, can be controverted either in defense to an action to collect the assessment, or in an equitable action to enjoin

the collection thereof, or even when the question arises in a purely collateral way; as when an action of ejectment is brought founded upon a title acquired by a purchaser at a tax sale to satisfy an illegal assessment, the owner may show in his defense that the requisite majority did not consent, notwithstanding the finding of the city authorities to the contrary.

Cooley on Taxation, 657 and cases cited.

Dillon Mun. Corp., Sec. 800 and cases cited.

Sharp v. Spier, 4 Hill, 76.

Henderson v. Baltimore, 8 Md., 352.

People v. Batchellor, 53 N. Y., 128.

Holland v. Baltimore, 11 Md., 186.

Carron v. Martin, 26 N. J. L., 594.

Mulligan v. Smith, 59 Cal., 206.

In the case of *Zeigler v. Hopkins, 117 U. S., 683*, there was but a single question presented for the consideration of the court, and that was whether, in an action of ejectment brought to recover the possession of lands sold for the non-payment of taxes levied to defray the expenses of opening a street in San Francisco, the land owner was estopped from showing, by way of defense, that the petition for the open-

ing presented to the mayor was not signed by the owners of the requisite amount of frontage. By a unanimous court it was held that the land owner was not so estopped; and in passing on the question the court cited and approved the case of *Mulligan v. Smith, supra*, saying expressly that that case is supported by both reason and authority.

B.

Not only is the tax an illegal one, but its enforcement would engender a multiplicity of suits.

That this tax is an illegal one, there is not a doubt; but we concede that that fact will not of itself furnish any ground for equitable interposition. In addition to the illegality of the tax proceedings, a complaining tax-payer must show that his case comes under some acknowledged head of equity jurisdiction. We submit that both the pleadings and proofs of the appellees (plaintiffs in the court below) show that this case comes under several acknowledged heads of equity jurisdiction.

First, it is alleged in the bill that plaintiffs have no plain, speedy and adequate remedy at law, and that unless the court interfere by an order and decree restraining the defendants, they will levy a tax upon plaintiffs, and upon all the property of other real

estate owners similarly situated, and will enter into a contract for putting down the paving, which will engender a *multiplicity of suits upon Ogden city and upon the plaintiffs and all others similarly situated* (Rec. 6); and the court makes a finding of fact that plaintiffs are without any speedy and adequate remedy at law for the recovery of the amounts paid under protest *without a great multiplicity of suits*, etc. (Rec. 187).

Under the authority of *Stringfellow v. Cain*, *supra*, and other authorities cited, which construe the Act of Congress "Concerning the Practice in Territorial Courts and Appeals Therefrom," this finding of the territorial District and Supreme Courts must be accepted as one of the admitted facts in the case in this court. But, in any event, the facts clearly justify such a conclusion. In the first place the original plaintiffs were seven in number, and filed their bill, as alleged, concerning a matter of general interest to all tax-payers in Ogden city, on their own behalf and on behalf of all others similarly situated. Subsequently, by a supplemental bill, *twenty-six* additional persons were made parties plaintiff. (Rec. 15-18). It appears also that *twenty-nine* different proprietors of contiguous property in this paving district paid their respective amounts

assessed against their respective properties, under protest (Rec 18-19; Finding 14, 187), which amounts were adjudged by the court to be repaid. (Rec. 189). Again, *sixty-eight* of the abutting property owners in this district protested against the levying of any local assessment for paving purposes in this district. (Rec. 185). And, finally, the evidence discloses that there were at the time of the attempted levy of this local assessment, no less than *ninety-eight* owners of property abutting upon the streets in the paving district in question. (See plats pp. 142-3 Rec). All but a very few of this number were owners in severalty. Therefore if the court had refused equitable relief by injunction, and had also refused the other equitable relief granted, and dismissed the bill upon the ground that the remedy at law was complete, what would have been the result? Ninety-eight (or nearly so) separate and distinct actions at law by as many different tax-payers, each seeking separately the same relief, or rather a portion thereof, which has in effect been given to their entire number in this single action. Ninety-eight separate controversies, each involving identical questions of law and fact with all the others, ninety-eight successive trials and ninety-eight separate judgments would seem to signify a

multiplicity of suits. Each individual property owner and tax-payer, if compelled to sue at law, could pay his tax under protest and bring an action to recover the amount back, or bring an action for damages against the officer enforcing the municipal collection, or permit his property to be sold for non-payment of the tax and then bring an action of ejectment agains the purchaser at the sale, or, he could retain possession and resist an action of ejectment brought by the purchaser; or he would possibly have some other legal remedy. And an equitable action to quiet the title could probably be maintained. But in no one of such actions could all the parties interested in the controversy be joined as plaintiffs or defendants, and thereby effect a settlement of the rights of all parties in one action. The record in this case furnishes a patent illustration of the concise statement of Judge Cooley in his work on taxation (2nd Ed.) at page 761.

> "There are cases also in which equity on a single record might dispose of controversies which at law would require a multiplicity of suits; and this fact may furnish ample ground for equitable jurisdiction; for both the public and the parties concerned are interested in avoiding unnecessary litigation."

Another significant fact which we call especial attention to is that the special assessment in question, by the express terms of the ordinance purporting to levy it, is payable in ten different installments, the first payable fifty days, and the last nine years, after the passage of the ordinance.

The effect of such a provision in the ordinance, if equitable relief, setting aside the entire assessment and enjoining its collection, were denied, is obviously apparent. Ninety-eight separate actions at law in some form, each year for a period of ten years! Under such a state of facts, argument would seem unnecessary, for the facts are their own argument, to show that any remedy furnished in a purely legal tribunal would be entirely inadequate, and that the equitable jurisdiction attached in this case for the purpose alone of preventing a multiplicity of suits. In addition to the authorities hereafter more fully considered, we refer here to the persuasive language of a leading text-writer emphatically upholding the exercise of equitable jurisdiction in cases such as the one at bar.

1 Pom. Eq. Jur. Sec. 260. 269, 270.

C.

The enforcement of this illegal tax would produce irreparable injury to the appellees and all others similarly situated.

The settled doctrine of courts of equity, crystallized from innumerable decisions is, that equity will enjoin the collection of an illegal tax, when, in addition to the illegality, it is shown that the injury resulting from its enforcement would be irreparable. The bill in this case contains such averments as bring this case clearly within that doctrine. It is alleged that great and irreparable injury will result to the plaintiffs, and to all others similarly situated, if said assessments are made and the contract for paving entered into by the defendants (Rec. 6), and facts in detail are alleged in both the original and supplemental bills clearly justifying such allegation. The facts found by the court clearly show that if the collection of this illegal tax were enforced, great and irreparable injury would result to the appellees. Among the facts so found are, that appellees are without any speedy and adequate remedy at law; that the assessment constitutes a cloud upon the title of the various plaintiffs to their several parcels of land; that

the appellant asserts that it will annually for nine years after the date of the findings, levy assessments upon said real estate for the payment of said paving, and collect the same from the appellees; that appellant has already caused to be sold the property of certain of the appellees under and by virtue of said assessment; that the lots affected by said assessment, and described in the ordinance levying it, vary in depth from a minium of 75 feet to a maximum of 150 feet, and that the property of appellees vary greatly in depth; that no ascertainment of actual benefits to the property assessed was ever made in order to determine the amount of assessment or to determine whether the amount assessed exceeded the actual benefits to the property by reason of the improvement, but the cost of the improvement was assessed upon the abutting property at an arbitrary rate of $12.00 per front foot without any finding, or attempt to find, the amount of actual benefits to the property (as required by section 9 of the statute *supra*); that the actual benefits to the property assessed for said improvement were not equal and uniform, nor was the assessment equal and uniform; that abutting owners in sufficient number protested, but, notwithstanding such protest, the ordinance levying the tax

was passed, and a contract for the paving entered into (Rec. 186-89). It is then found as a conclusion of law that the entire proceedings were void as having been taken without jurisdiction. Such a showing is certainly overwhelmingly sufficient to justify equitable relief by the preventive remedy of injunction, on the ground of irreparable injury.

> "By the term 'irreparable injury' it is not meant that there must be no physical possibility of repairing the injury; all that is meant is that the injury would be a grievous one, or at least a material one, and not adequately reparable by damages at law; and by the term 'the inadequacy of the remedy by damages' is meant that the damages obtainable at law are not such a compensation as will, in effect, though not *in specie*, place the parties in the position in which they formerly stood. * * * * The fact that the amount of damage cannot be accurately ascertained may aonstitute irreparable damage. * * * It is no objection to the exercise of the jurisdiction by injunction that a man may have a legal remedy. The question in all cases is whether the remedy at law is, under the circumstances, complete."
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> W. U. Tel. Co. v. Rogers, 42 N. J. Eq., 311, 314, quoting from Kerr on Inj. 200.

In the cases of *Newell v. Sass, 31 N. E. Rep., 176, 180*, the Supreme Court of Illinois thus defines the scope of the term "irreparable injury:"

> "Irreparable injury' as used in the law of injunctions does not necessarily mean that the jury is beyond the possibility of compensation in damages, nor that it must be very great; and the fact that no actual damages can be proved, so that in an action at law the jury could award nominal damages only, often furnishes the very best reason why a court of equity should interfere in a case where the nuisance is a continuous one."
>
> Citing Elliot, Roads & S., 497.

The facts in the case at bar show that the injury to the appellees and their property by casting unnecessary and repeated clouds on the title of said property from year to year for nine years, thereby compelling a multiplicity of suits to remove the same, or for other relief, at great expense, is a wrong of a repeated and continuing character, and the damages which may result therefrom cannot be measured or estimated by by any certain pecuniary standard. Under such circumstances, equity will enjoin the contemplated proceedings upon the ground that the resulting injury would be irreparable; for

in an action to recover damages for any of the resulting injuries to appellees in this case, the jury would be compelled, from the inherent nature of the wrongs, to estimate the damages by conjecture and not by any accurate standard.

Wilson v. Mineral Point, 39 Wis. 164.

Com. v. Pittsburg R. Co., 24 Pa. St. 160.

The word "irreparable" in the sense that it is used by courts of equity to express the rule that an injunction will issue to prevent wrongs of a repeated and continuing character, is not to be interpreted in its literal sense as defined by lexicographers. In legal parlance it has no such an expanded meaning, but is used as synonymous with "material" or "grievous."

Kerr on Inj. 199.

Sanderlin v. Baxter, 76 Va. 299.

S. C. 44 Am. Rep. 165, 168.

W. U. Tel. Co. v. Rogers, 42 N. J. Eq. 314.

It is apparent that the injury to the appellees, and to each of them separately, would be both a material, grievous, and, therefore an irreparable, one, if this illegal assessment were enforced each year for nine years, as threat-

ened, and that therefore the Supreme Court of the territory was right upon that ground alone, in affirming the judgment of the trial court, which enjoined the collection. As hereafter shown, also, this tax is a lien, or rather an apparent lien upon the land of appellees and of each of them, and constitutes an apparent cloud on each of their respective titles. This apparent cloud unquestionably diminishes the market value of the land and threatens a possible loss of it to the owners. It constitutes an apparent encumbrance upon it, and therefore an apparent defect in the title; and no strictly legal remedy could furnish adequate compensation for the injury occasioned thereby. No argument is necessary to show that such an injury is irreparable in the sense that equity will prevent it by injunction.

D.

The enforcement of this illegal tax would throw an apparent cloud upon the title of the land of each of the appellees which equity will intervene to prevent.

The statute under which this special assessment was levied, or attempted to be levied, makes the same, and each annual installment thereof, a lien upon the land of each of the ap-

pellees in the paving district. Such lien constitutes a cloud upon each of their titles, but if the tax itself is illegal and the levy thereof fatally defective, the cloud is an apparent, rather than a real and valid, one. The illegality of the tax, however, does not appear upon the face of the record, thereby requiring evidence *dehors* the record to establish its illegality. The record makes out a *prima facie* right in the taxing authorities to levy the assessment and collect it, and a *prima facie* right in one who should become a purchaser of the property of any of the appellees at a tax sale to satisfy the assessment. That is, the record shows that the city council acquired jurisdiction to levy and collect the assessment, thereby compelling a resort to evidence *aliunde* to overcome the *prima facie* showing of the record, and prove a total want of jurisdiction. We recognize the rule that no cloud upon a title justifies the interference of a court of equity, where the proceedings, which it is alleged create such a cloud, are void upon their face. This rule is stated by Cooley on Taxation, as follows:

> "If the tax is a lien upon lands, it may then constitute a cloud upon the title; and one branch of equity jurisdiction is the removal of appar-

> ant clouds upon the title, which may diminish the market value of the land, and threaten a possible loss of it to the owner. A cloud upon one's title is something which constitutes an apparent incumbrance upon it, or an apparent defect in it; something that shows *prima facie* some right of a third party, either to the whole or some interest in it. An illegal tax may or may not constitute such a cloud. If the alleged tax has no semblance of legality; if, upon the face of the proceedings, it is wholly unwarranted by law, or for any reason totally void, so that any person inspecting the record and comparing it with the law is at once appraised of the illegality, the tax, it would seem, could neither constitute an incumbrance, nor an apparent defect of title; and, therefore, in law, could constitute no cloud. If this be so, the jurisdiction which is exercised by courts of equity, to relieve parties by removing clouds upon their titles, *could not* attach in such a case." (p. 779.)

But the distinguished author states the contrary doctrine with equal clearness and precision:

> "When, however, the illegality or fatal defect *does not* appear on the face of the record, but must be shown by evidence *aliunde*, so that the record would make out a *prima facie* right in

> one who should become purchaser, and the evidence to rebut this case may possibly be lost, or be unavailable from death of witnesses or other cause, or when the deed given on a sale of the lands for the tax would, by statute, be presumptive evidence of a good title in the purchaser, so that the purchaser might rely upon that for a recovery of the lands until the illegalities were shown, the courts of equity regard the case as coming within their ordinary jurisdiction, and have extended relief on the ground that a cloud on the title existed or was imminent. The case son this point are numerous, and in considerable variety, as would be anticipated in view of the different tax systems under which they have been made" (p. 780.)

This court has twice recently announced substantially the same rule as that expressed in the extract last quoted.

> Gage v. Kaufman, 133 U. S., 471.
>
> Union Pac. R. Co. v. Cheyenne, 113 U. S., 517.

In fact it is the universal rule estabiished by an unbroken line of authorities in all of the American courts. It is upon this principle of the law that we rely. The city council made a finding that the owners of a necessary majority

of the abutting front feet had not protested. A special committee of the city council, appointed for the purpose of ascertaining if a majority had protested, made a written report to the council that a majority had not protested, but on the contrary, that there was an actual majority of front feet of $202\frac{1}{2}$ (or 202.66?) in favor of paving. (Rec. 27-8, 143). This report was accepted by the council (Rec. 28) April 4, 1892, and on April 11, 1892, a resolution was passed by the council to proceed as speedily as possible to pave in this district (Rec. 28; finding 7, Rec. 186); and thereafter bids were advertised for and other proceedings taken looking to the completion of the pavement. (Rec. 186 et seq.) The notice of intention to pave, which was published, was held to be sufficient on its face by the Supreme Court of the territory on the first appeal in this case.

Armstrong v. Ogden city, 9 Utah, 255.

According to the face of the record therefore, the council had jurisdiction to proceed to levy the assessment and pave, but *in fact*, the council had no jurisdiction to proceed, because of certain facts which existed outside of the record, and which established that the recital of the record as to the truth of the fundamen-

tal jurisdictional fact, was in fact untrue; and to emphasize our position in this respect, the record disclosed that as many as twenty-three witnesses testified in the trial court on behalf of appellees, whose testimony was directed chiefly to proving that a sufficient number of owners of abutting front feet had protested against paving, and that therefore the council never acquired jurisdiction to proceed. (Rec. 34-112.) The trial court found as a fact that the assessment constitutes a cloud upon the title of the various plaintiffs to their several parcels of realty, and a conclusion of law is also made and signed to the same effect. (Rec. 187-188). Such findings being binding upon this court, and constituting admitted facts in the case, certainly furnish a sufficient basis for the conclusion that a court of equity will enjoin the collection of this assessment in order to prevent a cloud upon the title of appellees' realty.

E.

The invalidity of the tax does not appear upon the face of the record, and therefore extrinsic evidence is necessary to establish the invalidity thereof; in which case the remedy at law is inadequate, and a resort to equity is absolutely necessary.

The proposition just stated, intermingling both law and fact, is admitted by counsel for appellant, but it is urged that if the record does not show the invalidity of the tax, that fact must be clearly alleged in the bill. It is claimed that no such allegation is made, either in the original or supplemental bill in this case, and that the absence of such an allegation is fatal. While such an allegation is not made as a separate and independent allegation in so many words, yet it appears from the whole bill, and exhibits attached thereto as a part thereof, that extrinsic evidence is necessary to establish the invalidity of the tax.

First, the original bill alleges that the owners of more than one-half of the front feet on Twenty-fifth street within said paving district, protested against the levying of any local assessment against or upon their property for the purpose of paving the said street in

said district; and second, it is alleged therein that to pay the expense of said improvement the common council have under advisement an ordinance which provides for the paying of said expenses, and which has passed its first reading, which ordinance is attached to and made a part of the bill, and marked exhibit "B." [Rec. 2, 3 and 4]. In the preamble to said ordinance is this provision:

> *"And whereas in said paving district No. 2, there has not been filed written objections to the improvement mentioned, signed by the owners of one-half the front feet on said Twenty-fifth street from the west line of Washington avenue to the west line of Wall avenue." (Rec. 9.)*

Here we have an allegation in the bill that a sufficient number of contiguous proprietors *did* protest, and another allegation therein that the common council found that a sufficient number *did not* protest. It is first alleged as an actual fact, independent of the record of the council, that a sufficient number protested against the improvement, and it is then alleged in effect that the records of the council show that a sufficient number did not protest; for the ordinance is made a part of the bill, and it contains a finding by the council that a sufficient number did not protest. The bill first

alleges what the fact is, and then alleges that the council made a finding directly repugnant to the actual fact. Furthermore, the supplemental bill alleges (Rec. 18), that on the 22nd day of March, 1893, the council passed the ordinance attached to the original bill, and the answer to the supplemental bill expressly admits the passage thereof. (Rec. 22.) It is therefore an *admitted fact upon the face of the pleadings* that the council actually found that the necessary jurisdictional fact existed, and that such a finding was made a matter of record; and it is, in addition thereto, alleged in the bill that that finding is positively untrue. Such allegations are unquestionably the equivalent of an allegation that evidence *dehors* the record must be resorted to in order to impeach it.

Again it is alleged that:

> "The mayor and common council of Ogden City claim and pretend that they have the right and authority to enter into a contract for the paving of said Twenty-fifth street in said district No. 2, and to levy a special tax upon the abutting property liable for assessment in said paving district No. 2, etc." (Rec. 5.)

This means, of course, that, relying upon the finding of the council in favor of its juris-

diction, that body proposes to exercise such jurisdiction, notwithstanding the actual fact which exists *dehors* the record, and can be established by extrinsic testimony, that that body has no jurisdiction whatever. It affirmatively and conclusively appears from the face of the bill that *certiorari* would not be an available remedy because of the fact that the records of the common council show a finding of that body in favor of its own jurisdiction. How could such a finding be overcome except by extrinsic evidence? It is unquestionably averred in the bill that a sufficient number of contiguous proprietors actually protested; and it is also unquestionably averred therein that the common council made a finding that such a number *did not protest*. The implication necessarily results that a resort must be had to extrinsic evidence in order to overcome the *prima facie* showing of the record of the council. Unequivocal averments in a pleading will support implications which necessarily result therefrom.

Reynolds v. Hosmer, 45 Cal., 616.

Ogden State Bank v. Barker, 12 Utah, 13.

Enright v. Grant, 5 Utah, 334.

And if it is claimed that the bill is uncertain because it does not allege *in totidem verbis* the necessity of a resort to evidence *aliunde* the record in order to establish want of jurisdiction in the common council, our reply is that such an objection must be raised by a special demurrer, under the code of civil procedure of Utah, pointing out in what particulars the bill is alleged to be uncertain.

2 Com. Laws Utah Sec. 3221, 3222.

Owen v. Oviatt, 4 Utah, 95.

DeMortin v. Albert, 68 Cal., 277.

Yolo County, v. Sacramento, 36 Cal., 193.

A fact that must not be forgotten in this connection is that no objection was made to the introduction of any evidence in the court below upon the ground that the bill failed to allege the necessity of a resort to extrinsic evidence in order to establish a lack of jurisdiction in the common council to levy the assessment. Four days were consumed in the trial of the case at *nisi prius*, and during that time twenty-seven witnesses were examined, and a large amount of documentary evidence was introduced, almost exclusively for the purpose of showing that a sufficient number of

owners of abutting property had protested against paving in this district, and, consequently that the finding of the council to the contrary was untrue. *No objection was interposed to such evidence.* Based upon such evidence the court made a finding of fact that the owners of a majority of abutting front feet did protest against the levy of the assessment for paving in said district (Rec. 185), and found as a conclusion of law that neither the city nor its council ever obtained jurisdiction to make said improvements. (Rec. 188). The most that can be urged against the bill is that it is somewhat uncertain in failing to allege *in totidem verbis* that extrinsic evidence is necessary to establish the invalidity of the tax; and we do not even concede the bill is uncertain in that respect if it is construed as a whole. But if it is merely indefinite or uncertain, such indefiniteness and uncertainty are cured by the findings of the court (heretofore referred to) as a trier of the facts.

Lewis v. Bartsfield, 75, Ind., 390.

Garard v. Garard, 135 Ind., 15.

Glaspie v. Keator, 56 Fed. Rep., 203.

Shaw v. Waterbury, 46 Conn., 263.

Every reasonable intendment will be made in favor of the bill, even though implications

are resorted to, since what is necessarily understood or implied in a pleading forms a part of it as much as if it was expressed.

Batterson v. R. Co, 49 Mich., 184.

Kelley v. Rogers, 21 Minn., 147.

Lothr v. Murphy, 45 Mo. App. 519.

White v. Spencer, 14 N. Y., 247.

Hazelton v. Union Bank, 32 Wis., 34.

It must not be forgotten also that counsel for appellant in this case insist that jurisdiction appears upon the face of the record of the common council. They say in their brief:

> "It must be remembered that jurisdiction appears upon the face of this record and that the city council decided in a judicial way that it had jurisdiction." (p. 46).

But this is an appeal from a territorial court; and this court has determined that its authority, on an appeal from a territorial court is limited to determining whether the court's findings of fact support its judgment or decree, and whether there is any error in rulings, duly excepted to, on the admission or rejection of evidence.

San Pedro, etc. Co. v. United States, 146 U. S., 120.

We respectfully submit that the allegations of the bill and supplemental bill, and the facts as found by the trial court and adopted as the facts by the territorial Supreme Court, by rendering a general judgment of affirmance, bring this case within the several acknowledged heads of equity jurisdiction which we have heretofore specifically enumerated. But to give a court of equity jurisdiction to enjoin the collection of this special assessment, it is only necessary that the case fall within some *one* acknowled head of equity jurisdiction. As said by Mr. Justice Field in the case of Dows v. Chicago, 11 Wall, 108:

> "It must appear that the enforcement of the tax would lead to a multiplicity of suits, *or* when the property is real estate, throw a cloud upon the title of the complainant before the aid of a court of equity can be invoked."

The findings of fact of the trial court, which are the admitted facts in this court, show that this action to enjoin the collection of the special assessment in question, is maintainable upon several distinct grounds, and that the appellees have no plain, speedy and adequate remedy at law.

II.

Certiorari is not the proper remedy.

It appears from the findings in this case that the record of the common council shows upon its face that the council had jurisdiction. The record makes a *prima facie* showing in favor of the legality of the tax. It was only by evidence *dehors* the record that the illegality of the tax was, or could have been established. It is not definitely urged by appellants counsel that *certiorari* would have been an available remedy, but their brief contains an intimation to that effect. It being admitted by them, however, that jurisdiction appears upon the face of the record (Brief 46), it necessarily follows that the complainants could not have obtained any relief by a writ of *certiorari*.

Ewing v. St. Louis, 5 Wall, 413.

III.

The appellees had no adequate remedy at law.

Appellant's sixth assignment of error is that the court erred in holding that the plaintiffs had no plain, complete and adequate remedy at law. (Brief 31). It is insisted that the statutory remedy given by section 1, *supra*, of the statute is an exclusive remedy and pre-

cludes a resort to a court of equity to enjoin the collection of the tax. That portion of said section upon which appellants rely, reads as follows:

> "And no such special tax shall be declared void, nor shall any such assessment or part thereof be set aside in consequence of any *error* or *irregularity* committed or appearing in any of the proceedings under this act or the acts of which it is amendatory, but any party feeling aggrieved by any such special tax or assessment or proceeding may pay the said special tax assessed upon his, her or its property, or such installments thereof as may be due at any time before the same shall become delinquent, under protest and with notice in writing to the city collector that he intends to sue to recover the same, which notice shall particularly state the alleged grievance and grounds thereof, whereupon such party shall have the right to bring a civil action within sixty days thereafter and not later to recover so much of the special taxes paid as he shall show to be illegal, inequitable and unjust, the cost to follow the judgment to be apportioned by the court, as may seem proper, which remedy shall be exclusive."

The contention that the remedy given by the section just quoted is an exclusive one and precludes relief in a court of equity is completely answered by the territorial Supreme Court in this case.

In support of the contention of consel for appellant that the foregoing statute furnishes to appellees an exclusive remedy and inhibits a resort to equity, they cite four cases from this court which we will briefly review.

The *R. R. Tax Cases, 92 U. S., 575*, were three cases wherin the Circuit Court of the northern district of Illinois had enjoined appellants from collecting taxes assessed by the proper officers of the *State of Illinois* against three several railroad companies In those cases the suggestion that there was an exclusive statutory remedy was not considered nor passed on. The court incidentally mentions the system prevailing in the customs and internal revenue departments of the general government, and refers to it as "a complete system of corrective practice in regard to all taxes imposed by the general government, which in both branches is founded upon the idea of appeals within the exclusive departments."

The court then quotes this language from an act of congress enacted in 1867:

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," and then states that it applies alone to taxes levied by the United States, and that it is only cited to show the sense of congress of the evils to be feared if courts of justice could, in any case, interfere with the process of collecting the taxes on which the government depends for its continued existence. Furthermore, it appears that the state board of equalization of Illinois had jurisdiction in all those cases; and in holding that the collection of the *state* revenue would not be enjoined, the court said there was reason and authority for relaxing the rigid rule in cases of taxes levied by counties, towns and cities.

In *Shelton v. Platt, 139 U. S. 591*, cited by appellant, while it is true that the court held that the remedy provided for by the statute of Tennessee to recover back an illegal tax after payment, was an exclusive one, still the court very emphatically intimates that if any irreparable injury to complainants had been shown, equitable interposition to restrain the collection of the tax would have been proper. And the question of the jurisdiction of the paving authorities was not raised nor discussed. It affirmatively appeared also that there were no equities in the bill.

The case of *Snyder v. Marks, 109 U. S., 189,* also cited by appellant, is not in point. The sole object of the action was to restrain the collection of a tax which purported to be levied under the internal revenue laws. The court refused the injunction on the sole ground that the act of congress of July 13, 1866, as amended by the act of March 2, 1867, absolutely prohibited the maintenance of a suit in any court to restrain the assessment or collection of any tax levied under the internal revenue laws.

In the last case, cited by appellant, of *Dows v. Chicago, 11 Wall, 108*, this court held that a decree of the Circuit Court for the northern district of Illinois dismissing a bill filed to restrain the collection of a tax, was proper, upon the sole and only ground that it did not appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or throw a cloud upon title, or produce any other result which equity would intervene to prevent. The question of the exclusiveness of a statutory remedy was not discussed nor passed on.

But let us explain that portion of section 1 of the statute, quoted in appellant's brief (p. 38-39), and upon which appellants counsel rely in asserting that the remedy provided for

therein is exclusive of other remedies. This language occurs at the outset:

> "And no such special tax shall be declared void, nor shall any such assessment or part thereof be set aside in consequence of *any error or irregularity* committed or appearing in any of the proceedings under this act or the acts of which it is amendatory; but any party feeling aggrieved by any *such* special tax or assessment may pay under protest with a notice in writing that he intends to sue to recover the same."

The statute then states that this remedy shall be exclusive.

Let it be remembered at the threshold of this discussion on this topic, that appellees (plaintiffs below) are not seeking to have this assessment set aside for any *error* or *irregularity*. It is attacked because the council *never acquired jurisdiction to levy it;* and, as said by the territorial Supreme Court in this case in discussing this question:

> "But this statute did not contemplate a case where the whole initiatory proceedings were absolutely void, and where no jurisdiction had ever been acquired to commence the improvements or levy the tax. * * * If, after having acquired jurisdiction the city council should have *errone-*

> *ously* levied a larger tax than was necessary * * * or * * * * should *irregularly* have assessed more property against a person than he owned, then, of course, the party injured would be compelled to remedy such *error* or *irregularity* by giving a proper notice and commencing action as in this section of the statute provided. But it cannot be maintained that when the tax was *wholly void and illegal*, as in this case, the parties injured were compelled to use this special and summary remedy, when the whole field of equitable relief was open to them." (Rec. 200).

On the question as to whether a statutory remedy is an exclusive one, Cooley in his work on taxation says:

> "For merely *irregular* assessment, the statutory remedy is also the exclusive remedy. It is supposed to be adequate to all the requirements of justice, and it is the party's own folly if he fails to avail himself of it." (Page 751.)

The word italicized is so emphasized by the author himself, manifestly to distinguish such an assessment from one made by a board or tribunal having no jurisdiction. It is equivalent to a statement that an absolutely void assessment, made without any jurisdiction in the tribunal making it, as in the case

at bar, will be set aside by a court of equity and its collection enjoined.

The case of *Chambers v. Satterlee, 40 Cal. 497*, was an action to recover an assessment for alleged improvements on a street in San Francisco. The court held that the remedy of the aggrieved party was by appeal to the board of supervisors, as provided by statute, and that no mere *irregularity* could be set up as a defense to an action to recover the amount of the assessment. But the court said, as tersely expressed in the syllabus:

> "It was the intention of the statute * * * * *to leave open for judicial inquiry all questions of a jurisdictional character*, and to submit all other questions to the decision of the board of supervisors."

In the analogous cause of *Emery v. Bradford, 29 Cal., 75*, the Supreme Court of California held that the remedy of an owner of a lot in San Francisco assessed for work on a street in front of the same, if dissatisfied with the decision of the superintendent of public streets, is an appeal from such decision to the board of supervisors. But in discussing the statute, requiring an appeal to the board of supervisors, the court said:

> "If the proceedings are regular, so that *the proper officers have jurisdic-*

> *tion to act,* * * * * their determinations are valid and can only be reviewed in the mode appointed by law." (p. 85).

The statute providing for an appeal to the board of supervisors expressly stated that their decision should be final and conclusive. But the court held that their decision was final and conclusive only in correcting *errors* and *irregularities*; and that on jurisdictional questions such decision was not final and conclusive. The court further said, at page 86:

> "*There are acts to be performed of a jurisdictional character essential to the validity of the assessment.* It is not to be supposed that the conclusiveness of the decision of the board of supervisors is to extend to that class of acts."

In the case of *Wright v. the City of Boston, 9 Cush., 233*, the Supreme Judicial Court of Massachussetts, in holding that an objection to a tax for some *defect* or *irregularity* in making the assessment must be taken advantage of by appeal, said:

> "For any defect or irregularity in the course of proceeding in making the assessment, any ground of objection, *which does not go to show the whole proceeding a nullity*, he must take his appeal, if he has one."

The various states have a variety of statutory provisions prescribing the procedure to be resorted to by an aggrieved tax-payer to secure a correction of his assessment for overvaluation, or for errors and irregularities committed by the taxing authorities. Appeals to boards of equalization, or to boards of review, petitions for abatement, payments under protest and suits to recover back, as in the Utah statute above quoted, are some of the methods prescribed in order to obtain relief from errors, irregularities, overvaluation or other wrongs complained of by aggrieved tax-payers. And it is usually held by the courts that the aggrieved party must pursue the statutory remedy to secure relief from errors and irregularities, such as overvaluation and analogous mistakes, which do not affect the jurisdiction of the board or tribunal levying the tax. But when it appears that the board or tribunal levying the tax had absolutlely no jurisdiction, as in this case, then a complaining tax-payer may ignore the statutory remedy provided for correcting mere errors, and resort to a court of equity for relief. If there is no jurisdiction, the entire proceedings are void, and equity will afford relief by injunction if the facts are such as to bring the case within a recognized head of equity jurisdiction. In other words,

in such cases as the one at bar, where the council had no jurisdiction, the statutory remedy need not be pursued.

Board v. Cattle Co. 31 Pac., (Wyo.), 268.

Topeka etc. Co. v. Roberts, 25 Pac., (Kan)., 854.

Consumers' Ice Co. v. State, 33 Atl., (Md)., 427.

Yocum v. Bank, 43 N. E., (Ind)., 231.

Union Pac. Ry. Co. v. Cheyenne, 113 U. S., 516.

Stanley v. Board of Supervisors, 121 U. S., 535.

The case of *Stanley v. Board of Supervisors, supra*, is an instructive case in this connection. It was an action to recover from the board of supervisors of Albany county, New York, certain amounts paid as taxes on shares of national bank stock. The court held that the assessing officers, in making the assessment were acting *within their authority*, and that, *for that reason* the duty devolved upon the stockholders to take such steps as were required by law to obtain a correction of the over assessment. But the court, speaking through Mr. Justice Field, said:

> "*It is only when the assessment is wholly valid*, or void with respect to separable portions of the property, the amount collected on which is ascertainable, or when the assessment has been set aside as invalid that an action at law will lie for the taxes paid, or for a portion thereof. * * * In nearly all the states, probably in all of them, provision is made by law for the correction of *errors* and *irregularities* of assessors in the assessment of property for the purposes of taxation. This is generally through boards of revision or equalization as they are often termed, with sometimes a right of appeal from their decision to the courts of law. *They are established to carry into effect the general rule of equality and uniformity of taxation* required by constitutional or statutory provisions. * * * To these boards of revision, by whatever name they are called, the citizen must apply for relief against *excessive* and *irregular* taxation, *where the assessing officers had jurisdiction to assess the property.* * * * * Their action being judicial, their judgments *in cases within their jurisdiction* are not open to collateral attack."

The court then expressly holds that where even overvaluation has arisen from the adoption of a rule of appraisment which conflicts with a constitutional or statutory direction

and operates unequally on a large class of individuals or corporations, a party aggrieved may resort to a court of equity.

IV.

The court did not err in failing to find on the issues raised by appellant's answer of (1) estoppel and (2) statute of limitations.

(1) ESTOPPEL.

The fifth assignment of error (Apps. brief. 30) is to the effect that the court erred in failing to find on the issue of estoppel raised by the defendants' amended answer to the supplemental bill.

In discussing this assignment counsel for appellant make the statement (brief 52) that all the plaintiffs in the supplemental complaint are estopped because they stood by, well knowing that the city council had levied the assessment complained of, and that the city was making the improvement, and did not bring any action to restrain the city or its council from doing the work until the work was completed and the contractors paid for doing the same in full. To this statement we enter a most emphatic denial. There is not a syllable of testimony in the record even tending to show such a state of facts. There is no

testimony showing or tending to show that any of the appellees knew the improvement was being made or that the improvement was being made at all; and there is not a *scintilla* of evidence in the record that the work ever was completed or that the contractors were paid a single dollar for doing the work. No evidence whatever was introduced in support of this plea of estoppel. When no evidence, or insufficient evidence, is introduced in relation to an issue, findings of fact are unnecessary.

Rogers v. Duff, 97 Cal., 66.
Sterling v Smith, 97 Cal., 343.
Golden v. Newbrand, 52 Iowa, 59.
Thompson v. Myrick 24 Minn., 4.

The facts alleged constituting the plea of estoppel was, under the Utah code, new matter and deemed controverted by the plaintiffs.

2 Com. Laws, Utah Sec. 3248.

Being new matter it constituted an affirmative defense and the burden of proof was upon the defendants to establish it.

Under such circumstances, there being absolutely no evidence in the record tending to sustain the plea, a finding of fact thereon must necessarily have been adverse to the appellant. Therefore the findings already found

being sufficient to support the judgment, there is no error.

Groome v. Ogden city, 10 Utah, 54.

Knowles v. Seale, 64 Cal., 377.

Then again the facts found by the court expressly negative any estoppel. If the facts found by the court are true, there could be no estoppel. In this connection it must be borne in mind that there was no plea of estoppel in the answer to the original bill. The original bill was filed May 21st, 1892, (Rec. 7); and the findings show that the first move in the direction of paving by appellant was taken on March 7th, 1892, and that bids were to be received by the city until *May 23rd, 1892*, for paving this district. (Rec. 186). How can counsel consistently say in their brief (52) that plaintiffs did not bring their action to restrain the council from doing the work until the work was completed, when the findings show that the bill was filed two days before the final day for receiving bids? (Rec. 186). Then again, the ordinance levying the special assessment was passed March 22nd, 1893,—nearly one year after the filing of the original bill. (Finding 12, Rec. 187). These affirmative findings unquestionably completely negative the facts alleged by way of estoppel in the

defendant's answer to the supplemental bill. Such being the result, it was not error to fail to make an express finding on the plea of estoppel.

Haarstick v. Fox, 9 Utah, 110, 123.

Maxfield v. West, 6 Utah, 327, 379.

Fox v. Haarstick, 156 U. S., 673.

Then, this being an equitable action, if the decree is supported by the evidence it makes no difference whether it is supported by the findings or not.

Maxfield v. West, 6 Utah, 327.

S. C., 6 Utah, 379.

This court has decided that a failure of the lower court to find other facts than those affirmatively found, is not open to revision here.

Stanley v. Board of Supervisors, 121 U. S., 535.

The findings affirmatively made by the court, it will be readily conceded, support the judgment entered by the court. The decree is in strict conformity to the findings of fact and conclusions of law. It also appears that appellant did not make a request for any findings other than those made by the court. No findings were tendered by the appellant with a

request that they be signed, and no objection was made in the trial court to a mere omission to make findings on certain issues. It is a well understood rule that if a party desires any particular finding of fact, he must call the attention of the court to the matter of fact upon which he desires a finding.

Lucas v. San Francisco, 28 Cal., 591.
In re Arguella's estate, 85 Cal., 151.
Thompson v. Bank, 82 N. Y., 1.
Irrigation Co. v. Barnhart, 22 Ore., 389.
Barry v. Schmidt, 57 Wis., 176.

Not only must a party make a request for specific findings upon particular questions of fact, but if the court refuses his request, he must save an exception to such refusal. There being no exception in the record in this case to a refusal of the court to make findings on any particular matters of fact, such questions are therefore not a proper subject of review by the court.

Lucas v. San Francisco, *supra*.
Cook v. De La Guerra, 24 Cal., 237.
Irrigation Co. v. Barnhart, *supra*.
Thompson v. Bank, *supra*.
Coombs v. Ry. Co., 11 Utah, 137.

The trial court also finds as a fact, and decides as a conclusion of law, that the common council had no jurisdiction to make the assessment, and that therefore, the assessment provided for in the ordinance of March 22nd, 1893, was and is absolutely void. (Rec. 188). It is a familiar rule that judgments made by a tribunal having no jurisdiction over the subject matter, are void, and that no estoppel can arise from proceedings which are absolutely void. In the foregoing discussion we have demonstrated that the whole proceedings in levying the special assessment in question, and in attempting to collect the same, are absolutely void, as having been taken by a body having no jurisdiction. Under such circumstances there could be no estoppel, and the trial court for that reason alone, did not commit any error in failing to find on that so-called issue.

Freeman Judg., Sec. 264.

Mercier v. Chase, 9 Allen, 242.

Howell vs. City of Tacoma, 3 Wash., 711.

S. C. 29 Pac. Rep., 447.

Dean v. Charlton, 23 Wis., 590.

(2) STATUTE OF LIMITATIONS.

The statute of limitations pleaded by appellant, is set up in the answer to the supplemental bill, and is that portion of section 1 of the statute printed as an appendix to appellant's brief (p. 67-8) which requires that an action brought to recover taxes back which are paid under protest, must be brought within sixty days after the payment thereof under protest. At the outset it will be seen that the statute so pleaded could only apply, in any event, to that portion of the supplemental bill which alleges the payment of certain amounts by certain of appellees under protest, and prays for the recovery thereof, and to that portion of the judgment requiring the repayment thereof. So far as the original bill is concerned, and the purely equitable relief prayed for therein, the statute has no possible application, and in fact is not pleaded as a defense thereto. But the statute has no application to the cause of action for money paid under protest. The statute, as heretofore shown, applies to cases where there are only errors, irregularities, overvaluations, or other defects which are not jurisdictional. The council, not having jurisdiction to levy the tax, could not proceed under the statute, and therefore the tax-payers, need not proceed un-

der the statute to recover the amounts paid. In fact the amounts paid under protest were not *taxes* in any sense of the term. The whole proceedings being void, the amounts paid were simply enforced unlawful contributions to the city treasury, and could be recovered back in an action for money had and received. Our former contention being correct, that the statutory remedy by paying under protest and suit to recover back, is not an exclusive remedy because the council had no jurisdiction, it necessarily follows that the period of limitation provided for in the same statute has no application.

But the findings of fact constitute the admitted facts in this case, and *they fail to show when the money was paid under protest.* Assuming the statute to be applicable, the period of limitation would certainly commence to run from the time of payment under protest. This time the findings fail to fix. The fourteenth finding of fact is that appellants, in pursuance of the ordinance of March 22nd, 1893, were about to expose appellees' real estate for sale to satisfy the illegal assessment; and that, after their property had been advertised for sale, they paid the amounts fixed in the findings under protest. (Rec. 187). For aught that appears from the findings, these amounts

may have been paid the day before the supplemental bill was filed.

In the next place the statute limits itself to a *case where a person pays before the tax becomes delinquent.* It contemplates a case where the assessment as a whole is legal and where there are special objections by an individual to certain portions due from him, such as overvaluation, or that the method of assessing was not uniform. In this case the appellees *paid after the tax became delinquent.* Can it be said that the appellees are absolutely without remedy when the appellant has extorted their money from them, by absolutely void proceedings and against their protest? The city has no right to retain this money. It belongs *ex æquo et bono* to appellees, and the law does give them a remedy.

Keener Quasi Cont. pp. 421-5.

And we reiterate what we said respecting the so-called defense of estoppel pleaded by appellant. The court finds that the amounts named in the findings, were paid under protest and that appellees are entitled to recover from appellant the respective amounts so paid. (Rec. 187-8). Such a finding necessarily negatives the defense of the statute of limitations to the supplemental bill. And no finding was

tendered by appellant on this subject and no exception entered to a refusal to give it. But, again we say that the statute limiting the time to sixty days within which to bring an action to recover taxes paid under protest, is applicable only to such cases where the common council obtains jurisdiction.

Wahlgreen v. Kansas City, 21 Pac., 1068.

Good v. Norby, 28 Iowa, 188.

In the case of *Wahlgreen v. Kansas City*, *supra*, the court said:

> "*When jurisdiction is once obtained, irregularities* can only be corrected in the manner *and within the time prescribed by statute.*"

This is certainly equivalent to a declaration that when jurisdiction is *not* obtained the statute has no application; and, if the statutory period of limitation has no application to the case, then a finding on that question would be immaterial, for the defense itself is rendered immaterial by the decision that the whole proceedings are void. It is not error for the court to fail to make express findings on an issue raised in the pleadings which has become immaterial during the course of the trial.

Chambers v. Emery, 13 Utah, 374.

Porter v. Woodward, 57 Cal., 535.

Groome v. Ogden city, 10 Utah, 54.

Witcher v. Conklin, 84 Cal., 499.

Drainage Dist. v. Crow, 20 Oregon, 537.

Knoch v. Van Bernuth, 145 N. Y., 643.

V.

Do the findings support the judgment?

On pages 36-38 of appellant's brief, appellant's counsel discuss the question as to whether or not the findings of the trial court support the judgment; and appellant's second assignment or error asserts that the facts found do not entitle the plaintiffs to a decree for any relief whatever. (Brief 29). Appellant's sole and only complaint is directed to that portion of finding No. 6 (Rec. 185) which affirms that the abutting property owners who protested against the assessment for paving, owned, and protested for, more than one-half of the whole frontage on said Twenty-fifth street within said paving district. Counsel for appellant declare (brief 38) that this is a finding that, upon the face of the record, the council had no jurisdiction; and that therefore appellees had

a plain, speedy and adequate remedy at law. Such is not the case. The court found as a fact that the owners of a majority of abutting front feet actually protested; not that the record shows on its face that they actually protested. On the contrary, the record of the council shows on its face that the owners of a majority of abutting front feet *did not* protest. A special committee of the common council compared the protests filed *with the record showing ownership* and made a report to the council that a majority of frontage *had not* protested. (Rec. 143). And the trial court finds that the council, in spite of the protests, on March 22, 1893, passed the ordinance levying the assessment, which ordinance is made exhibit "A" to the findings (Rec. 187, 189, 192). And in said ordinance is an express finding made by the council that a sufficient majority *had not* protested. The mere filing of a protest *purporting* to be signed by the owners of a majority of front feet is not conclusive. Suppose an abutting owner should sign a protest against paving and represent therein that he owned 100 front feet in the paving district, whereas, in truth and in fact, he owned only twenty-five front feet. Would his assertion that he owned 100 feet be conclusive? Not at all. If such were the case, a person owning no property in the

district could protest against paying and assert his ownership of the entire district, and thereby defeat a municipal improvement, when all of the actual property owners in the district were in favor of the improvement. The question of ownership is a question of fact, independent of the showing made by the protestors in their written protest, and the trial court found that issue of fact directly contrary to the finding made by the common council. The finding of the court is conclusive here.

Council for appellant discuss the question of the sufficiency of the protest signed by the property owners, *as disclosed by the evidence*. The trial court finds the protest to have been sufficient, and this court has repeatedly decided in the cases of *Stringfellow v. Cain* and other cases cited *supra* that it has no authority to pass upon the weight of the evidence to support the findings. In this connection we call attention to the fact that both the seventh (brief 31) and ninth (brief 32) assignments of error present purely questions of the weight of the evidence and its sufficiency to sustain the findings, and therefore, within the rule just announced, will not be considered by this court.

VII.

The payments made by appellees were not voluntary.

It is urged by appellant (brief, 29, 30, 59, 60), that the Supreme Court of the territory erred in affirming the judgment of the trial court wherein the latter court awarded the respective appellees individually judgment for the amount of taxes paid for two reasons:

1. That the appelles had a complete remedy at law under the provisions of the statute heretofore discussed.

2. That the payments were voluntarily made and therefore could not be recovered.

The first objection, that the appellees had a complete remedy at law, has already been fully discussed, and will not be further considered. The second objection, that the payments were voluntarily made, is not tenable. The trial court found that the appellant was about to expose the real estate described in the original and supplemental bills for sale to satisfy the illegal assessment imposed by the ordinance of March 22nd, 1893, and that appellees, after their property had been advertised for sale and was about to be sold to satisfy the said illegal assessment, paid under

protest to appellant the amounts named in the finding. (Finding 14, Rec. 187).

Payments made under such circumstances are not voluntary because:

1. The authority to levy the tax was wholly wanting, and the assessment absolutely void.

2. The money was paid to appellant for its own use.

3. The payments were made by appellees under compulsion or duress, to prevent the sale of their property and to prevent an apparently valid cloud on the title thereof.

4. The assessment has been set aside by the court.

5. The payments were made under protest.

2 Dillon Mun. Corp. (4th Ed.), 940, et esq.

Grand Rapids v. Blakely, 40 Mich.,367.

2 Dillon Mun. Corp. (4th Ed.), 942.

Cooley Taxation (2n Ed.), 811.

Keener Quasi-Cont., 424-5.

State Tonnage Tax Cases, 12 Wall, 204.

Erskine v. Van Arsdale, 15 Wall, 75.

Phila. v. Diehl Collector, 5 Wall, 731.

Mayor etc. v. Riker, 9 Vroom, 225.

The amounts paid under protest as dis-

closed by the findings, are recoverable in this action because when equity has acquired jurisdiction of a controversy for one purpose, it will retain jurisdiction and settle it for all purposes.

Ober v. Gallagher, 93 U. S., 199.

Pom. Eq. Jur., Sec. 231, 234, 236, 239.

It is also said in appellant's brief (p. 59 that the court erred in not finding upon the issue of voluntary payment. This objection is not available because:

1. The court did expressly find that the payments were not voluntarily made.

2. No such error is assigned in appellant's brief.

VIII.

The judgment of the Supreme Court of Utah territory should be affirmed.

E. M. ALLISON, JR.,
Solicitor for Appellees.

DATED OCTOBER, 1897.

OGDEN CITY *v.* ARMSTRONG.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 127. Argued November 11, 1897. — Decided November 29, 1897.

An examination of the record discloses that none of the complainants, save one, was assessed with a sufficient amount of taxes, to enable him to bring the case here on appeal, and accordingly, under the doctrine of *Russell* v. *Stansell*, 105 U. S. 303, and *Gibson* v. *Shufeldt*, 122 U. S. 27, the appeal is dismissed as to such parties.

No jurisdiction vested in the appellant's city council to make an assessment and levy a tax for the improvements which are the subject of this controversy until the assent of the requisite proportion of the owners of the property to be affected had been obtained, and the action of the city council in regard to that question was not conclusive.

In order to justify a court of equity in restraining the collection of a tax, circumstances must exist bringing the case under some recognized head of equity jurisdiction; and this case seems plainly to be one of equitable jurisdiction, within that doctrine.

When the illegality or fatal defect in a tax does not appear on the face of the record, courts of equity regard the case as coming within their jurisdiction.

When the authorities have jurisdiction to act, the statutory remedy is the taxpayer's exclusive remedy; but when the statute leaves open to judicial inquiry all questions of a jurisdictional character, a determination of such questions by an administrative board does not preclude parties aggrieved from resorting to judicial remedies.

THE original bill in this case was filed in May, 1892, in the Fourth Judicial District Court of the late Territory of Utah, against Ogden City, a municipal corporation, and its mayor and the members of its common council; and it was thereby sought to restrain the city and its officers from levying assessments upon the real estate of the plaintiffs and others simi-

larly situated, for the purpose of paving a portion of one of the streets of the city.

To this bill a demurrer was filed, which was sustained by the District Court, and a judgment was entered dismissing the bill. On appeal to the Supreme Court of the Territory that judgment was reversed, and the cause remanded to the court below. An answer to the bill was then filed, denying substantially the equities of the bill. Subsequently, on April 9, 1894, a supplemental bill was filed, bringing in additional parties complainant, and alleging that since the filing of the original bill the defendants had passed the ordinance assessing the properties of the plaintiffs, and were about to expose to sale the real estate described in the original and supplemental bills to satisfy the assessments, and threatened to continue to sell said real estate annually for ten years as each instalment of said assessment became due, whereby the plaintiffs had been compelled to pay certain amounts, stated in detail, in order to prevent a sale of their property, and to prevent a cloud upon their titles; and that certain real estate belonging to some of the plaintiffs had been sold by the city to satisfy the illegal assessments. The prayers were for a decree declaring the ordinance and assessments to be void restraining the defendants from proceeding thereunder; that an account be ordered of the amounts paid by plaintiffs under protest; that plaintiffs have judgment for the same; that the sales of real estate be set aside, and for general relief. An answer was filed to the supplemental bill denying specifically all of its allegations, but admitting that the ordinance in question was passed as alleged. It alleged affirmatively that the plaintiffs were estopped to complain as in the supplemental bill alleged; that the same did not state facts sufficient to constitute a supplemental complaint; that the cause of action was barred by the statute of limitations; that there was a misjoinder of parties plaintiff, and that there was a misjoinder of causes of action.

On the 27th day of October, 1894, findings were signed, and judgment entered, giving the plaintiffs the relief prayed for in both the original and the supplemental bill. The decree of

the court below was on appeal affirmed by the Supreme Court of the Territory, from whose decree an appeal was taken and allowed to this court.

The findings of fact were as follows:

1. That the plaintiffs were at the date of the filing of the complaint in this action residents and taxpayers in Ogden City, Weber County, Utah Territory, and brought this action concerning a matter of general interest to all taxpayers in said Ogden City on their own behalf and on the behalf of all others similarly situated.

2. That the defendants, except Ogden City, at the time of the bringing of this action were the mayor and members of the common council of said Ogden City, defendant.

3. That on the 7th day of March, 1892, proceedings were had by the common council of said Ogden City as follows:

"Finance committee recommending immediate creation of three paving districts as follows: District No. 2, Twenty-fifth street from the west line of Washington avenue to the west line of Wall avenue.

"Councillor Dee moved to lay on the table for one week. Motion lost.

"Councillor McManis moved to adopt the motion. Carried."

4. That the above were the only proceedings had by said council of Ogden City in regard to the creation of said paving district prior to the publication of the notice hereinbelow mentioned; and upon the same day the following proceedings were had:

"Councillor Spencer moved the following motion, in pursuance of the proceedings already taken in ordering the creation of three paving districts: 'I move that the council adopt the accompanying notice of intention, and that the same be published for twenty days, beginning with to-morrow morning, Tuesday, March 8th.' Said notice was read and Councillor Dee moved to lay on the table for one week. Motion lost, Dee and Elliott voting 'aye;' Calvert, Cannon, Graves, McManis, Shurtliff and Spencer voting 'nay.' The original motion was then put and carried, Calvert, Cannon, Graves, McManis, Shurtliff and Spencer voting 'aye,' and Dee and Elliott voting 'nay.'"

Statement of the Case.

5. That thereupon, on March 9th, 1892, in the Ogden Daily Standard the following notice of intention mentioned above was published, to wit:

"Notice of intention of the city council of Ogden City of creating a district for paving and of paving and macadamizing the streets therein and to defray the expenses of such improvement by local assessment.

"The city council of Ogden City, situate in the county of Weber, Territory of Utah, gives notice that it intends to make the following improvements, to wit, pave and macadamize the following streets: Twenty-fifth street from the west line of Washington avenue to the west line of Wall avenue. This district shall be known as paving district No. 2. The boundaries of the district to be affected and benefited are the lines running one hundred and fifty feet back and parallel with the outer lines of each side of the streets on each and every block and for the full length thereof therein. The estimated cost of such improvement is $40,000. For the payment of the costs and expenses thereof the city council intends to levy local taxes upon the real estate lying and being within said paving district and to the extent of the benefits to such property by reason of such improvement. The city council will, on March 29, 1892, at 10 A. M., hear objections in writing and from any and all persons interested in said local assessment. By order of the city council:

"T. P. BRYAN, *City Recorder.*"

6. That on March 29, 1892, at 9.55 o'clock, D. H. Peery and sixty-eight others, including all the plaintiffs in this action and in the supplemental complaint, who were then the owners of real property within the said paving district No. 2 and with frontage on Twenty-fifth street within the said paving district, filed a protest with the said recorder of said Ogden City, protesting against the levying of any local assessment against or upon their property for the purpose of paving said street within said district; that said persons so protesting owned and protested for more than one half of the whole

frontage on said Twenty-fifth street within said district, to wit, 2414 feet; that after said hour of 10 A.M. of said day certain persons who had protested to the amount of 302¼ feet withdrew their protests, leaving at all times 2111¾ feet frontage on said Twenty-fifth street in said district still protesting against the said local assessment; that the total number of feet fronting on said Twenty-fifth street in said paving district, as mentioned in said notice of intention above set forth, was 3960, of which 660 feet belonged at said time and still belong to said Ogden City and were then and are now used for public purposes by the said city, and 125 feet of said frontage were then and are now the property of the said Ogden City, and was public school property, used and owned for public schools.

7. That notwithstanding said protest of said abutting property owned on said Twenty-fifth street in said paving district No. 2, and without giving any other or further notice except as hereinbefore stated, the said city council, on the 4th day of April, 1892, passed the following resolution, to wit:

"*Resolved*, That the city proceed as speedily as possible to the paving of Twenty-fifth street district with Utah sandstone blocks; that the city engineer be instructed to prepare the necessary specifications at once and submit the same at the next meeting of the council; that the competition of said work be restricted to *bona fide* residents of Ogden, and that so far as it is possible only Ogden labor be employed in the performance of the work."

8. That on May 2, 1893, said city council of Ogden City passed a resolution instructing the city recorder to advertise for bids for the paving of Twenty-fifth street in said district; which notice was as follows:

"To paving contractors: Bids will be received by the city recorder of Ogden City until 12 o'clock M. May 23, 1892, for the paving of Twenty-fifth street, in Ogden City, from Washington to Wall avenue, according to the specifications of the city engineer of Ogden City, on file in the city recorder's office. Competition is restricted to *bona fide* residents of Ogden City. The city reserves the right to reject any and all bids. Specifications will be furnished on application to the city recorder."

9. That no specifications had been made by the city prior to this time, but afterwards new specifications were made and filed providing for the paving, grading, and curbing of said Twenty-fifth street, and were adopted by the city council; which specifications provided for the paving of said street with asphaltum and the sides of the street with sandstone blocks and curbing the street, and the contract which was awarded for the doing of said work provided that the contractor should keep the said street in repair for two years after the work upon the same was finished.

10. That the plaintiffs in this action were at the date of the filing of the complaint herein, to wit, May 21, 1892, the owners of the real property mentioned in the complaint, but upon the trial of this action it appeared that John Broom and William Chapman were deceased; Samuel Chapman, administrator of the estate of William Chapman, and Hester Broom, administratrix of the estate of John Broom, were substituted as plaintiffs, and said other parties were still the owners of the property mentioned as belonging to them in the complaint in this action.

11. That said plaintiffs had upon filing their complaint obtained a temporary injunction against the said defendants, but afterwards a demurrer to said complaint was sustained by the said court and said complaint ordered dismissed; which ruling was afterwards by the Supreme Court of the Territory of Utah reversed, and the said cause was ordered remanded, with directions to the defendant to answer said complaint.

12. That the said council, in spite of the protest hereinbefore mentioned, proceeded and at the time of the filing of the complaint in this action had upon its passage the ordinance attached as Exhibit B to the complaint in this action, and afterwards, on the 22d day of March, 1893, passed the ordinance which is hereto attached and marked Exhibit A and made a part of these findings.

13. That on the 9th day of April, 1894, the plaintiffs filed a supplemental complaint in this action and asked that Mathias Biel, Joseph Clark, George W. Lashus, Lamoni Grix, Carl Sorenson, J. E. Horrocks and Ann Horrocks, J. S. Lewis,

Lindsey R. Rogers, Patrick Healey, Joseph Morely, Zilpha J. Stephens, W. C. Warren, Almira C. Baker, D. H. Stephens, Mary A. Stephens, Elizabeth Stephens and The Ogden Union Depot and Railway Company, a corporation, be made parties to this action; which supplemental complaint was ordered by the court to be filed; that at the time of the filing of the supplemental complaint the said parties (except The Ogden Depot and Railway Company, a corporation) were and still are the owners of real estate fronting on said Twenty-fifth street (and said plaintiff last named was the owner of real estate assessed with said special tax, but not included in said paving district) included in said paving district, and upon the trial of this action D. H. Peery, Jr., and The Realty Company of Kittery, Maine, a corporation, and J. Pingree and Zilpha J. Stephens, Carrie Lewis and George W. Murphy were added as parties plaintiff, and were at the date and still are the owners of real estate in said district fronting on said Twenty-fifth street, the pleadings having been allowed to be amended by the court in accordance with such facts.

14. That said Ogden City, in pursuance of said ordinance of March 22, 1893, was about to expose the real estate described in the original and supplemental complaints to sale to satisfy the illegal assessment imposed by said ordinance, and that the parties plaintiff in this action, after their said property had been advertised for sale and was about to be sold to satisfy the said illegal assessment then due, paid under protest to said Ogden City, in order to prevent the sale of their property, the following amounts, to wit, J. C. Armstrong, $95.04; Mathias Biel, $63; Joseph Clark, $48; Samuel Chapman, for the William Chapman estate, $49.20; Joseph Clark, for Clark, Emmet and Thompson, $30; William Driver, $60; H. I. Griffin, $23.76; Lamoni Grix, $24.90; Ann Horrocks and James E. Horrocks, $124.80; Geo. W. Lashus, $60; H. D. and J. S. Lewis, $82.09; Carrie Lewis, $30; Joseph Morely, $36; Patrick Healey, for Patterson and Healey, $30; Joseph Clark, for Patterson and Clark, $60; L. R. Rogers, $74.04; J. H. Spargo, $48; D. M. Stephens, $14.70; Carl S. Sorenson, $20.40; W. C. Warren, $48;

Geo. M. Kerr, guardian of the Nichols heirs, $160.08; D. H. Peery, Jr., $24; Realty Company of Kittery, Maine, $748.80; Job Pingree, $35.40; Ogden Union Depot and Railway Company, a corporation, $118.80; Geo. W. Murphy, $154.20.

15. That said plaintiffs are without any speedy and adequate remedy at law for the recovery of said amounts without a great multiplicity of suits, and said assessment constitutes a cloud upon the title of the various plaintiffs to their several parcels of realty, and that said city asserts that it will annually for nine years hereafter levy assessments upon said real estate for the payment of said paving and collect the same from the said parties plaintiff, and has already caused to be sold the property of certain of the plaintiffs under and by virtue of said assessment.

16. That the number of feet frontage in said paving district was 3300, as the same is described in the ordinance, Ex. A; that the difference between the district described in the ordinance and the district described in the notice of intention consisted of 660 feet of the public property of the said Ogden City, and the lots affected by the said assessment and described in said ordinance varied in depth, some being 75 feet deep and others 150 feet deep, and that the property owned by the various parties plaintiff in this action varied greatly in depth; that no ascertainment of actual benefits to the property assessed was ever made in order to determine the amount of assessment or to determine whether the amount assessed exceeded the actual benefits to the property by reason of the improvement, but the cost of the improvement was assessed upon the property abutting and fronting upon Twenty-fifth street within the said paving district at an arbitrary rate of $12 per front foot without any finding or attempt to find the amount of actual benefits to the property; that the said improvement was made without any general plan and form of public improvement having been adopted by the said Ogden City, and the actual benefits to the property assessed for said improvement were not equal and uniform, nor was said assessment equal and uniform.

Mr. R. H. Whipple for appellant. *Mr. T. D. Johnson* was on his brief.

Mr. E. M. Allison, Jr., for appellees.

Mr. Justice Shiras, after stating the case, delivered the opinion of the court.

The first question to be determined is whether the amount in controversy is sufficient to give us jurisdiction of the appeal.

Although no motion was made to dismiss the appeal, it was suggested at the argument that, as it was not competent to make up the sum necessary to give this court jurisdiction by uniting the several sums for which each taxpayer was liable, this was such a case, and that therefore we should dismiss the appeal.

Undoubtedly, it is the well-settled rule of this court that, in a suit in equity brought in the Circuit Court by two or more persons on several and distinct demands, the defendant can appeal to this court as to those plaintiffs only to each of whom more than five thousand dollars is decreed. *Russell* v. *Stansell*, 105 U. S. 303, was a case in its facts much like the present one. There land within a particular district was assessed for taxation, each owner being liable only for the amount wherewith he was separately charged; a bill of complaint was filed by a number of them, praying for an injunction against the collection of the assessment, and from a decree dismissing the bill an appeal was taken to this court. It was held that, while the complainants were permitted, for convenience and to save expense, to unite in a petition setting forth the grievances of which complaint was made, the object was to relieve each separate owner from the amount for which he personally, or his property, was found to be accountable, and that such distinct and separate interests could not be united for the purpose of making up the amount necessary to give this court jurisdiction on appeal.

The same conclusion was reached in *Gibson* v. *Shufeldt*, 122 U. S. 27, where the previous cases were fully discussed.

Opinion of the Court.

An examination of this record discloses that none of the complainants, save one, was assessed with an amount sufficient to have enabled him to bring the case here on appeal, and accordingly, under the doctrine of the cases cited, this appeal must be dismissed as to such parties.

But it appears that the Realty Company of Kittery, a corporation of the State of Maine, a party complainant in the supplemental bill, had been assessed, under the ordinance complained of, for the sum of $748.80, as an instalment for one year, and had been compelled to pay the same, and that the city was threatening to continue said proceedings and to sell the real estate of said company annually for nine years as each instalment for a like sum became due. The liability of that company then, under the ordinance and assessment complained of, amounted to the sum of $7488, and as that company could, had the decree of the court below been adverse to it, have brought the case here on appeal, so, upon the authorities above referred to, it is competent for the defendant city to do the same.

Upon the merits, the first and most important question to consider is whether the city council had jurisdiction to assess and collect the paving tax.

The proceedings were initiated and the tax sought to be levied and collected under the provisions of chapter 41 of the Session Laws of 1890 of the late Territory of Utah. The thirteenth section thereof reads as follows:

"In all cases before the levy of any taxes for any improvements provided for in this act the city council shall give notice of intention to levy said taxes, naming the purposes for which the taxes are to be levied, which notice shall be published at least twenty days in a newspaper published within said city. Such notice shall describe the improvements so proposed, the boundaries of the district to be affected or benefited by such improvements; the estimated cost of such improvements, and designate the time set for such hearing. If at or before the time so fixed written objections to such improvements signed by the owners of one-half of the front feet abutting upon that portion of the street, avenue or alley

to be so improved be not filed with the recorder, the council shall be deemed to have acquired jurisdiction to order the making of such improvements."

The bill alleged, the answer admitted, and the trial court found that the notice of intention to pave in district No. 2, and to defray the expenses thereof by levying a local tax on abutting property owners, was published on March 9, 1892, and in which it was stated that the city council would on March 29, 1892, at 10 o'clock A. M., hear objections in writing from any and all persons interested in said local assessment.

The sixth finding of the trial court was as follows:

"That on March 29th, 1892, at 9.55 o'clock, D. H. Peery and sixty-eight others, including all the plaintiffs in this action and in the supplemental complaint, who were then owners of real property within the said paving district No. 2, and with a frontage on Twenty-fifth street within the said paving district, filed a protest with the said recorder of said Ogden City protesting against the levying of any local assessment against or upon their property for the purpose of paving said street within said district; that said persons so protesting owned and protested for more than one-half of the whole frontage on said Twenty-fifth street within said district, to wit, 2414 feet; that after said hour of 10 A.M. of said day certain persons who had protested to the amount of 302½ feet withdrew their protests, leaving at all times 2111¾ feet frontage on said Twenty-fifth street in said district still protesting against said local assessment; that the total number of feet fronting on said Twenty-fifth street in said paving district, as mentioned in said notice of intention above set forth, was 3960 feet, of which 660 feet belonged at said time and still belongs to said Ogden City, and was then and is now used for public purposes by said city, and 125 feet of said frontage was then and is now the property of the said Ogden City, and was public school property, used and owned for public schools."

It is contended on behalf of the appellant that the city council, on April 4, 1892, determined that less than half of the whole frontage had protested, and that, as the city council was acting judicially in a proceeding duly inaugurated, such

action cannot be reviewed in an equitable action to restrain the collection of the tax, but should be reviewed, if at all, by certiorari, in which action the whole record would be removed to the District Court.

So far as this proposition involves questions of facts as to the proportion of frontage covered by the protests, we, of course, accept the finding, on that subject made by the trial court, and approved and adopted by the Supreme Court of the Territory. *Stringfellow* v. *Cain*, 99 U. S. 610; *Haws* v. *Victoria Copper Mining Co.*, 160 U. S. 303.

But the argument seems to be that when once that question of fact was determined by the city council, proceeding under the statute, their determination cannot afterwards be challenged in a collateral proceeding; that while it would not be conclusive in an action by certiorari to set aside the assessment, it is conclusive as against a proceeding by injunction to prevent the collection of the tax. It is said that the jurisdiction of the city council attached when by resolution or ordinance and publication it gave notice of its intention to make the improvement in question.

We agree with the courts below in thinking that no jurisdiction vested in the city council to make an assessment or to levy a tax for such an improvement, until and unless the assent of the requisite proportion of the owners of the property to be affected had been obtained, and that the action of the city council in finding the fact of such assent was not conclusive as against those who duly protested. The fact of consent, by the requisite number, in this case to be manifested by failure to object, is jurisdictional, and in the nature of a condition precedent to the exercise of the power.

"Where the power to pave or improve depends upon the assent or petition of a given number or proportion of the proprietors to be affected, this fact is jurisdictional, and the finding of the city authorities or council that the requisite number had assented or petitioned is not, in the absence of legislative provision to that effect, conclusive; the want of such assent makes the whole proceeding void." (Dillon's Municipal Corporations, vol. 2, sec. 800, 4th edition, where numerous cases

from the different States are cited in support of that proposition.)

In *Zeigler* v. *Hopkins*, 117 U. S. 683, a similar question was thus stated and decided:

"There is in reality but a single question presented for our consideration in this case, and that is whether, in an action of ejectment brought to recover the possession of lands sold for the nonpayment of taxes levied to defray the expenses of opening Montgomery Avenue generally, and not in obedience to an order of a court of competent jurisdiction to meet some particular liability which had been judicially established, the landowner is estopped from showing, by way of defence, that the petition for the opening presented to the mayor was not signed by the owners of the requisite amount of frontage; and this depends on whether the owner is concluded, (1), by the acceptance of the petition by the mayor and his certificate as to its sufficiency and the action of the board of public works thereunder; or, (2), by the judgment of the county court confirming the report of the board of public works.

"This precise question was most elaborately considered by the Supreme Court of California in *Mulligan* v. *Smith*, 59 California, 206, and decided in the negative, after full argument. With this conclusion we are entirely satisfied. It is supported by both reason and authority."

It is next contended on behalf of the appellant that if the city council wrongfully took jurisdiction, in face of the facts shown in or upon the face of its own proceedings, then the tax was absolutely void on its face, and the plaintiffs must seek their remedy at law; and further, if the city council wrongfully and falsely made its record to show facts sufficient to give it jurisdiction, when such facts never existed, then in order to get into equity plaintiffs must plead all such facts, and that even in such a case certiorari is, under the laws of Utah, a plain and perfect remedy.

It is doubtless true that the collection of a tax will not be restrained on the ground that it is irregular or erroneous. Errors in the assessment do not render the tax void; and usually there are legal remedies for all such mere irregulari-

ties and errors as do not go to the foundation of the tax, and parties complaining must be confined to these. As was held by this court in *Dows* v. *Chicago*, 11 Wall. 108: "A suit in equity will not lie to restrain the collection of a tax on the sole ground that it is illegal. There must exist in addition special circumstances, bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant."

But the present case would seem plainly to be one of equitable jurisdiction within the doctrine of that case. What is complained of is no mere irregularity or error in the assessment. As we have seen, there was an entire want of jurisdiction in the common council to proceed for want of the assent of the requisite proportion of property owners, and the assessment and tax were, therefore, void. That there was no plain and adequate remedy by certiorari would seem to be evident. Upon that writ nothing could have been shown by evidence of facts outside of the record. It is true that, in some of the States, provision is made by statute to bring such evidence in, but such is not shown to have been the case here. It is an admitted fact upon the face of the pleadings that the common council actually found that the necessary jurisdictional fact existed, and that such a finding was made a matter of record. The plaintiffs alleged in their bill and the defendants in their answer denied that the finding of the jurisdictional fact by the common council was an untrue finding. Such an issue required evidence *dehors* the record of the proceedings before the council in order to impeach their finding. The record of this case discloses that a large amount of oral evidence was introduced by the complainants, and admitted without objection by the defendants, to show ownership by the protesting parties, and to show that the common council were mistaken in finding that the requisite number had not protested.

Not only, however, was there a want of an adequate remedy in proceeding by a writ of certiorari, but, we think, equitable

jurisdiction was properly invoked to prevent a multiplicity of suits, and also to relieve the plaintiffs from a cloud upon their title.

The finding on this fact of the case was as follows:

"That said plaintiffs are without any speedy and adequate remedy at law for the recovery of said amounts without a great multiplicity of suits, and said assessment constitutes a cloud upon the title of the various plaintiffs to their several parcels of realty, and that said city asserts that it will annually for nine years hereafter lay assessments upon said real estate for the payment of said paving and collect the same from the said parties plaintiff, and has already caused to be sold the property of certain of the plaintiffs under and by virtue of said assessment."

If a tax is a lien upon lands, it may then constitute a cloud upon the title; and one branch of equity jurisdiction is the removal of apparent clouds upon the title, which may diminish the market value of the land, and possibly threaten a loss of it to the owner. It is doubtless true that it has been held by this and other courts that if the alleged tax has no semblance of legality, and if upon the face of the proceedings it is wholly unwarranted by law, or for any reason totally void, as disclosed by a mere inspection of the record, such a tax would not constitute a cloud, and that the jurisdiction which is exercised by courts of equity, to relieve parties by removing clouds upon their titles, would not attach.

But when the illegality or fatal defect does not appear on the face of the record, but must be shown by evidence *aliunde*, so that the record would make out a *prima facie* right in one who should become a purchaser, and the evidence to rebut this case may possibly be lost, or become unavailable from death of witnesses, or when the deed given on a sale of the lands for the tax would be presumptive evidence of a good title in the purchaser, so that the purchaser might rely upon the deed for a recovery of the lands until the irregularities were shown, courts of equity regard the case as coming within their jurisdiction, and have extended relief on the ground that a cloud on the title existed or was imminent.

Dows v. *Chicago*, 11 Wall. 198; *Hannewinkle* v. *Georgetown*, 15 Wall. 547.

Undoubtedly, for merely irregular assessments, where the authorities have jurisdiction to act, the statutory remedy is also the exclusive remedy. But when the statute, as in this case, leaves open to judicial inquiry all questions of a jurisdictional character, it is well settled that a determination of such questions by an administrative board does not preclude parties aggrieved from resorting to judicial remedies.

Thus in *Emery* v. *Bradford*, 29 California, 75, the Supreme Court of California, while holding that the remedy of an owner of a lot in San Francisco assessed for work on a street in front of the same, if dissatisfied with the decision of the superintendent of public streets, is an appeal from such decision to the board of public supervisors, and that, if the proceedings are such that the proper officers have jurisdiction to act, their determinations are valid and can only be reviewed in the mode provided by the statute, said: "That where there are acts to be performed of a jurisdictional character essential to the validity of the assessment, it is not to be supposed that the conclusiveness of the decision of the board of supervisors is to extend to that class of cases."

So in *Wright* v. *Boston*, 9 Cushing, 273, the Supreme Judicial Court of Massachusetts, in holding that objections to a tax for some defect or irregularity in making the assessment must be taken advantage of by appeal, stated the proposition thus: "For any defect or irregularity in the course of proceeding in making the assessment, any ground of objection, which does not go to show the whole proceedings a nullity, the owner must take his appeal, if he has one."

In *Union Pacific Railway* v. *Cheyenne*, 113 U. S. 516, 525, this court, through Mr. Justice Bradley, said:

"But it is contended that the complainant should have sought a remedy at law and not in equity. It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be

presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or be subjected to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the taxpayer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud cast upon his title by a tax under which a sale could be made would be a grievance which would entitle him to go into a court of equity for relief."

Numerous cases to the same effect may be found cited in Cooley on Taxation, 543.

Again, it is contended on behalf of the appellant, that the defendants cannot recover the taxes paid by them under protest because the Session Laws of Utah, 1890, sec. 1, p. 38, provide that "any party, feeling aggrieved by any such special tax or assessment or proceeding, may pay said special tax assessed or levied upon his property, or such instalments thereof as may be due, at any time before the same shall be delinquent, under protest, and with notice in writing to the city collector that he intends to sue to recover the same, which notice shall particularly state the alleged grievances and grounds thereof; whereupon such party shall have the right to bring a civil action within sixty days thereafter, and not later, to recover so much of the special tax as he shall show to be illegal, inequitable and unjust, the cost to follow the judgment, to be apportioned by the court as may seem proper, which remedy shall be exclusive."

As respects this contention we agree with the Supreme Court of the Territory, that this statute applies to cases where there are only errors, irregularities, overvaluations or other defects which are not jurisdictional, but that where the council, not having the jurisdiction to levy the tax, could not proceed under the statute, the taxpayers need not proceed under the statute to recover the money paid. Where the tax was wholly void and illegal, as in this case, the

statute and its remedies for errors and irregularities have no application.

Our conclusion is that the decree of the Supreme Court of the Territory of Utah, so far as it respects the Realty Company of Kittery, is affirmed, and that as to the other appellees the appeal is dismissed.